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SUPREME COURT, U. S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1960

No. 30

KEITH MARTIN, APPELLANT,

*vs.*

HERBERT WALTON, AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

FILED JANUARY 7, 1961
PROBABLE JURISDICTION NOTED MARCH 27, 1961

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

## No. 635

KEITH MARTIN, APPELLANT,

*vs.*

HERBERT WALTON, AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

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[fol. 1]

# IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,026

Keith Martin, Appellant,

vs.

Joseph S. Davis as Probate Judge of Johnson County, Kansas, Appellee.

Appeal from the District Court of Johnson County, Kansas.

Honorable Earl E. O'Connor, Judge, Division One.

## Abstract of Appellant From the District Court of Johnson County, Kansas

### Statement

This is an appeal which involves the constitutionality of amended Supreme Court Rules, 41 and 54, promulgated on December 15, 1958.

The Appellant is a Kansas resident and was licensed to practice law before the Kansas Supreme Court and all inferior courts of Kansas on February 12, 1948.

[fol. 2] The appeal is from an order quashing an alternative writ of mandamus which writ allowed the appellant to practice law in the Probate Court of Johnson County, Kansas, without local counsel and without regard to amended Rules 41 and 54 of the Kansas Supreme Court.

## The Pleadings

### In the District Court of Johnson County, Kansas

No. 42,026

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Keith Martin, Plaintiff,

vs.

Joseph S. Davis, as Probate Judge of Johnson County, Kansas, Defendant.

---

Petition for Writ of Mandamus—Filed February 29, 1960

Comes now the plaintiff and moves the Court for an order directing the Clerk to issue a writ of mandamus against the defendant, and as reasons therefor respectfully states:

1. The defendant is Probate Judge of Johnson County, Kansas, and may be served with process in said court at Olathe, Kansas.

2. Plaintiff is a duly licensed lawyer of the State of Kansas and was admitted to practice before the Kansas Supreme Court and all inferior courts on February 12, 1948; he resides at 6200 West 61st Street in the City of [fol. 3] Mission, Johnson County, Kansas. Prior to his admission he attended the public schools of Miami County, Kansas, and received his A.B. (1942) and LL.B. (1947) degrees from the University of Kansas, and was elected to Phi Beta Kappa and Order of the Coif. He graduated from the Harvard Business School in September, 1946, with an M.B.A. degree. In 1943-45 he resided in Kansas City, Missouri, and was employed by the Pratt & Whitney Aircraft Corporation and attended night law school at the University of Kansas City. While attending Kansas University Law School in 1945-46 and 1946-47, he taught economics at Kansas University.

3. Plaintiff was duly licensed to practice law in Missouri on August 2, 1947, and has since practiced law in

Missouri. He now maintains an office in the Bryant Building, Kansas City, Jackson County, Missouri.

4. He has also practiced law in Kansas, since April, 1948, and has continuously maintained an office in Mission, Kansas, since said date. He has been City Attorney of Mission, Kansas, since 1951, and is a member of the State Board of Tax Appeals of Kansas. He has represented the State of Kansas in highway litigation in the Kansas courts. He has authored an article on Kansas procedure in the Third Survey of Kansas Law, 6 Kan. L. Rev. 134 (1957).

5. Plaintiff states that Jackson County, Missouri, and Johnson County, Kansas, in which he maintains his two offices, are contiguous counties; that Wyandotte County, Kansas, is contiguous to each of the foregoing counties. [fol. 4] The three counties are part of one metropolitan area and have a population of about one million.

6. Plaintiff states that his clients frequently live in one county and either work or have business connections in another county and state. Their problems involve the laws and procedures of both states.

7. He states that his knowledge of the laws and procedures and his ability to practice in either state have been of assistance to him in obtaining clients and in being able to give them counsel and court representation. He is in the general practice of law. Since his admission to practice, he has tried as many litigated matters in Kansas as in Missouri; he has been and is a member of the state and local bar associations of Kansas and Missouri, has tried cases in the federal courts of each state, and has argued cases in the appellate courts of Kansas, Missouri, and the United States Courts of Appeals for the Eighth and Tenth Circuits.

8. Plaintiff states that he consults with as many clients in his Kansas office or home as in his Missouri office, although most of his office work is performed in his Missouri office.

9. Keith Martin informs the Court that his net income from law practice exceeds $15,000 per year and that ap-

proximately one-half of that sum has been earned from Kansas practice and has been so reported on his state income tax returns. He further states that a large proportion of his income is derived from court appearances including adoptions and the probate of estates of which the defendant's court has jurisdiction.

[fol. 5] 10. On December 15, 1958, the Supreme Court of Kansas entered and passed amended Rules 41 and 54, which are vague, arbitrary, and without standards, and have caused plaintiff's Kansas license to be in fact a nullity so long as plaintiff practices law "regularly" in Missouri; that said amended Rules are herewith attached and made a part of this petition.

11. Subsequent to the promulgation of said amended Rules 41 and 54, and the decision of *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190, involving plaintiff herein, the defendant has not allowed plaintiff to appear and try cases in the Probate Court of Johnson County, Kansas, unless he has the appearance and association of local counsel, whereas from February 12, 1948, to December 15, 1958, plaintiff regularly appeared for clients in the Probate Court of Johnson County, Kansas, without local counsel. Defendant has informed plaintiff that in the future he cannot appear as attorney for clients without the appearance and association of local counsel as required by amended Rules 41 and 54.

12. He states that local counsel, according to the minimum fee schedules of the Johnson and Wyandotte County, Kansas, Bar Associations, require compensation of approximately one-third to one-half of the fee for serving as local counsel; that said amended Rules 41 and 54 require plaintiff to share his income with local counsel who frequently are not acquainted with the case in issue and who are nevertheless required to be in court by defendant.

[fol. 6] 13. Plaintiff states that the application of amended Rules 41 and 54 not only deprive him of part of his income from his Kansas practice but also discourage clients from seeking his services. Because he cannot represent clients in Kansas courts without the compulsory presence of an-

other lawyer, clients come to believe that he cannot counsel them regarding Kansas law or represent them in Kansas courts.

14. That said amended Rules place plaintiff in the category of a foreign attorney, pursuant to G.S. 1949, 7-104, and render his Kansas license inoperative so long as he "regularly" practices in Missouri, unless he has another Kansas lawyer associated and appearing with him.

15. He has continuously listed and maintained phones at both offices and at his residence. Since 1948, Kansas lawyers have obtained service of pleadings upon him by mailing them to his Kansas office or residence or by leaving them at either place.

16. That said amended Rules 41 and 54 of December 15, 1958, as applied to plaintiff, violate the Fourteenth Amendment of the United States Constitution, and in particular, the Due Process and Equal Protection Clauses.

17. Plaintiff further states that if the amended Rules are based upon G.S. 1949, 7-104, then said statute, as applied to plaintiff, is also violative of Fourteenth Amendment due process and equal protection as guaranteed by the United States Constitution.

18. That unless the defendant allows plaintiff to appear before him in all present cases which plaintiff has [fol. 7] pending in his court and in all future cases without the appearance and association of local counsel, pursuant to the amended Rules 41 and 54, he will lose clients and a substantial part of his income and he will be deprived of his right to practice his profession in the court of the defendant, as granted to him by the Kansas Supreme Court; that his Kansas license granted him the right to appear in the Kansas Supreme Court and all inferior courts, which includes the court presided over by defendant.

19. Plaintiff has no adequate, plain and complete remedy at law, and as a matter of right he is entitled to file cases in the Probate Court of Johnson County, Kansas, and to try them without the appearance and association of local counsel because of the license granted to him by the Su-

preme Court of Kansas in 1948, and the defendant has a duty to allow plaintiff to appear and try cases in the Probate Court without local counsel. He has suffered and will suffer irreparable injury if this Court does not make an order directing the defendant to permit plaintiff to file and try lawsuits without the appearance and association of local counsel.

Wherefore, plaintiff prays this honorable Court to issue against the defendant a writ of mandamus commanding him to permit plaintiff to file cases in the Probate Court of Johnson County, Kansas, and to permit plaintiff to appear and try said cases without the appearance or association of local counsel and without regard to amended Rules 41 and 54 and G.S. 1949, 7-104, and in accordance with the license granted to him by the Kansas Supreme Court on February 12, 1948, and to declare amended Rules [fol. 8] 41 and 54 and G.S. 1949, 7-104, to be in violation of the Fourteenth Amendment of the United States Constitution as applied to plaintiff herein.

Payne, Jones & Payne, By Howard E. Payne, 122 East Park, Olathe, Kansas, Attorneys for Plaintiff.

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AMENDED SUPREME COURT RULES 41 AND 54
EFFECTIVE DECEMBER 15, 1958

Rule No. 41. Admission to Practice. As soon as practicable after the completion of an examination, the board shall file a report with the clerk of the court recommending the granting of the denial of the petition of the applicant. Whenever such report shall recommend the granting of a petition, unless some reason shall appear to the contrary, the court will make an order admitting the applicant to practice in all the courts of the state, which order shall become effective upon his taking an oath in open court, the form of which shall be in substance as follows:

> You do solemnly swear that you will support and bear true allegiance to the constitution of the United States and the constitution of the State of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire;

that you will not knowingly foster or promote, or give your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of, any falsehood in court; and that you will discharge your duties as an attorney and counselor of the Supreme Court and all inferior courts of the state of [fol. 9] Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability, So help you, God.

Upon the making of such order the clerk shall issue to such applicant a certificate of his authority to practice law in this and all inferior courts of the state, upon his signing his name on the roll of attorneys of this court. Whenever the board shall recommend a denial of the petition, an order will be made to that effect.

Provided further however, The authority granted to practice law shall not be exercised except as provided under Rule No. 54, *infra*, when the licensee herein has been admitted to the Bar of another state or territory and is regularly engaged in the practice of law in such other state or territory.

Rule No. 54. An attorney regularly practicing outside of this state and in good standing as a member of the bar of the place of his regular practice may be recognized as an attorney by the courts, commissions, and agencies of this state, for any action or proceeding, but only if he has associated with him as attorney of the record in such action or proceeding a member of the Bar of this state qualified under the provisions of G.S. 1949, 7-104, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record.

(Petition was verified by plaintiff as required by law.)

[fol. 10]

ALTERNATIVE WRIT OF MANDAMUS

The State of Kansas to Joseph S. Davis:

Whereas, it appears to this Court by the verified petition of plaintiff, Keith Martin, on file in the office of the Clerk of the District Court that plaintiff was admitted to the practice of law before the Supreme Court of Kansas and all inferior courts on February 12, 1948, and that he is a resident of Kansas, and

Whereas, it appears that the defendant is probate judge of Johnson County, Kansas, and

Whereas, it appears that the defendant requires plaintiff to have the appearance and association of another Kansas lawyer whenever plaintiff appears in the court of the defendant to file or try cases:

Now, therefore, in order that full and speedy justice shall be done in behalf of petitioner Keith Martin, you, Joseph S. Davis, as probate judge of Johnson County, Kansas, are hereby commanded and enjoined upon receipt of this writ, to allow and permit Keith Martin to proceed in your court to try and file cases without the appearance or association of another Kansas lawyer in all cases which he has pending in your court and in all cases which he may file or try hereafter, or in the alternative you are required to appear and show cause to the contrary before this Court on March 1, 1960, at 9:30 o'clock A. M., or as soon thereafter as said matter may be heard.

[fol. 11] Hereof fail not at your peril, and have you then and there this writ, and make due return of your execution of the same.

Betty West, Clerk of the District Court, Johnson County, Kansas.

(Seal)

The above writ allowed this 29 day of February, 1960. The defendant is hereby directed to do the things therein

specified, or appear and show cause to the contrary, as stated in said writ.

Earl E. O'Connor, Judge of the District Court, Johnson County, Kansas, Division No. One.

(Service of process was made on defendant on February 29, 1960.)

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ORDER OF CONTINUANCE

On March 1, 1960, the above entitled matter was continued by agreement until March 4, 1960, at 9 o'clock a. m.

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APPLICATION TO INTERVENE AS AMICUS CURIAE—
Filed March 3, 1960

Comes now the Johnson County Bar Association and asks leave of Court to be permitted to file such pleadings as to it may deem proper herein and in support thereof states that questions appear to be raised in this proceeding which are of interest and concern to the Johnson County Bar Association and that its appearance as *Amicus* [fol. 12] *Curiae* it is hoped will aid the Court in determination of the questions in this action.

Johnson County Bar Association by Committee on Unauthorized Practice, By Roy S. Lowe.

---

ORDER BY EARL E. O'CONNOR, DISTRICT JUDGE—
Filed March 3, 1960

Johnson County Bar Association given leave to enter appearance as *Amicus Curiae*.

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MOTION TO QUASH ALTERNATIVE WRIT OF MANDAMUS—
Filed March 3, 1960

Comes now the defendant and moves the Court for an order quashing the alternative writ of mandamus issued herein for the reason that neither said writ nor the peti-

-tion therefor state facts showing that plaintiff is entitled to such writ.

John J. Gardner, As County Attorney and Attorney for Defendant.

---

Hearing on Motion to Quash—Filed March 4, 1960

The Court: This is Case 26739, Martin versus Joseph S. Davis, as Probate Judge of Johnson County, Kansas.

The record shows that on February 29, 1960, a petition was filed by the plaintiff. The Court at that time issued an alternative writ of mandamus and hearing was set for 9:30 on March 1. That same day, at the defendant's request, the matter was continued to this morning. [fol. 13] On March 3 an application was presented by the Johnson County Bar Association to enter the case as *amicus curiae* and the Court at that time gave the Association leave to enter appearance as *amicus curiae* and to do any further acts that would aid the Court of course either on leave of the Court or at the Court's request in determining the matter. And I see that yesterday a motion to quash was filed by the defendant.

For the record we ought to get some appearances in here at this time.

Mr. Gardner: John J. Gardner appears for the defendant, Joseph S. Davis, as Probate Judge of Johnson County, and I am appearing as County Attorney for the county representing a county officer.

Mr. Payne: If the Court please, Howard E. Payne, Olathe, appearing for the plaintiff, Keith Martin.

Mr. Alden: If it please the Court, I am Bernhard W. Alden, Kansas City, Kansas. I am the chairman of the Committee on Unauthorized Practices of the Wyandotte County Bar Association and I have been requested by Mr. Willard Phillips, the president of the Wyandotte County Bar Association, to be present this morning representing that association in an unofficial capacity in that I am not requested to formally make application to enter the case as *amicus curiae;* however, I would like the record to show that I have offered the assistance of the Committee on Unauthorized Practices to Mr. Gardner. If there is any

assistance that we may give him in this case, we stand ready and anxious to do so.

The Court: You are not asking leave as such, though, to enter the case as *amicus curiae?*

[fol. 14] Mr. Alden: Not at this time, your Honor.

The Court: Mr. Lowe, do you want to make your appearance as far as the Johnson County Bar Association is concerned?

Mr. Lowe: Yes: that is all: as Committee on Unauthorized Practice.

The Court: And are you on that committee, Mr. Hackler?

Mr. Hackler: Yes.

The Court: Are the parties as such then ready to present and hear the motion to quash?

Mr. Payne: Plaintiff is ready, your Honor.

Mr. Gardner: Defendant is ready, your Honor.

The Court: You may proceed, Mr. Gardner.

Thereupon arguments were had and the appellee moved to quash the writ for three reasons: first, no instance of specific refusal was pleaded by plaintiff; second, the probate judge had to follow amended Supreme Court Rules 41 and 54, which are a plain mandate; third, the plaintiff was involved in *Taylor* v. *Taylor*, 185 Kan. 324, and raised the same issues which were decided adversely to him and the issues were therefore *res judicata*.

The appellant, by his attorney, urged, along with other contentions, that the amended rules were vague, arbitrary, and without standards and violated plaintiff's rights as guaranteed to him by the United States Constitution.

### Opinion of the Court After Oral Arguments

The Court: Very well. I might say frankly that the first point that the Court was concerned with was that that [fol. 15] was raised by the defendant, and I was unable to find very much law that would be squarely on that point, namely, whether or not this had to refer to a specific proceeding that was pending or about to be filed or attempted to be filed before the defendant.

There is an old case, in 40 Kan. 469, which briefly I think may give some basis to the idea that it does not have to refer to a specific case. In that case a district judge

had found an attorney in contempt of court. He not only fined him and gave him a jail sentence, he also forbade him to practice until he purged him of contempt. In other words, he just couldn't practice before that district judge until he purged himself. And the attorney then brought a direct proceeding of mandamus in the Supreme Court, and whether or not the issue was squarely raised, at least the Court went ahead and granted the writ, and of course it was just a general prohibition by the district judge. It didn't refer just to that case, as I understand; it was just generally that that attorney was not permitted to practice before this district court. Using that case as some basis, the Court in this case does not wish to predicate its decision on that point.

Of course, this motion to quash the alternative writ of mandamus is tantamount to a demurrer so far as ruling on the same is concerned. The Court finds that the facts that are set forth in the petition are substantially the same as those that were presented to the Supreme Court in *Taylor* v. *Taylor*, 185 Kan. 324.

While many of these facts that are contained in the petition are probably redundant and irrelevant to the real [fol. 16] issue involved—and I believe the Supreme Court even used that language in the Taylor case—the important fact is that the petition shows on its face that the plaintiff is a member of the Missouri Bar and regularly practices in that state, which squarely places him within the purview of Rules 41 and 54 of the Supreme Court of Kansas.

The real issue that is presented in this petition was presented and decided adversely in the Taylor case, that is, adversely to the plaintiff, including the constitutional matters that are raised in this petition.

By reason of that decision, plainly under the facts that are alleged in this petition, there is no clear-cut duty on the part of the defendant to permit the plaintiff to practice before his court without compliance with Rules 41 and 54 of the Supreme Court of Kansas. The Court feels that the Taylor case is controlling.

For that reason, the motion to quash the alternative writ is sustained and the matter is dismissed at the plaintiff's costs.

STIPULATION

Mr. Payne: Would your Honor also state into the record that Keith Martin, who is the plaintiff in this case, is the same Keith Martin, attorney, who was involved in the case of Taylor v. Taylor? We can agree that that is so?

The Court: Do you allege it in there? Of course, I am just passing now on the petition—

Mr. Davis: It is alleged in the petition.

The Court: It is alleged in there. I think that is sufficient. I doubt if anyone is going to quarrel over that.

Mr. Gardner: I don't see any objection to that.

---

[fol. 17] JOURNAL ENTRY

On this fourth day of March, 1960, the motion of the defendant to quash the alternative writ of mandamus comes on regularly for hearing. The parties appear in person and by their attorneys of record. Roy S. Lowe appears for the Committee on Unauthorized Practice of the Johnson County Bar Association as *amicus curiae*. Bernhard W. Alden is present for the Wyandotte County Bar Association.

Thereupon, arguments are heard by counsel of record and the court, after having duly considered the same, finds that the motion to quash should be sustained.

It Is, Therefore, Ordered that defendant's motion to quash the alternative writ of mandamus be and the same is hereby sustained and the plaintiff's petition and alternative writ is dismissed and the costs are assessed against plaintiff.

Earl E. O'Connor, District Judge.

---

NOTICE OF APPEAL

To Joseph S. Davis, As Probate Judge of Johnson County, Kansas, and His Attorney of Record, John Gardner:

Take notice that the plaintiff, Keith Martin, does appeal and has appealed from the following order made in the above entitled action by the trial court to the Supreme Court of Kansas:

[fol. 18] The order of March 4, 1960, sustaining defendant's motion to quash alternative writ of mandamus.

Payne, Jones and Payne, By Howard E. Payne, 122 East Park, Olathe, Kansas, Attorneys for Plaintiff.

Service of the above notice of appeal accepted and proof of service waived this 4th day of March, 1960.

John J. Gardner, Attorney for Defendant, Roy S. Lowe, Chairman, Committee on Unauthorized Practice, Johnson County Bar Association appearing as *Amicus Curiae*.

Transcript was filed by appellant with clerk of the District Court on March 7, 1960.

CERTIFICATE

The foregoing is a true and correct abstract of the record in the above entitled case.

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[fol. 19] SPECIFICATION OF ERROR

The trial court erred in sustaining the motion to quash the alternative writ. The amended Supreme Court rules 41 and 54 and G.S. 1949, 7-104, are in violation of the Fourteenth Amendment of the United States Constitution as applied to appellant.

Howard E. Payne, W. C. Jones, H. Thomas Payne, Attorneys for Appellant.

[fol. 20]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,026

---

KEITH MARTIN, Appellant,

vs.

JOSEPH S. DAVIS as Probate Judge of Johnson County, Kansas, Appellee.

---

MOTION TO STAY JUDGMENT OF DISTRICT COURT

Comes now appellant and moves the court for an order staying the judgment of the Johnson County District Court, and states as follows:

1. That on March 4, 1960, the District Court of Johnson County, Kansas, entered an order which requires appellant to have the association and appearance of another lawyer when appellant is representing clients in the District or Probate Court.

2. Appellant has regularly practiced in said courts from February 12, 1948, the date of his admission to the Kansas Bar, to the present time.

3. He incorporates herein by reference all of the facts as set forth in the abstract heretofore filed with this court.

4. On May 12, 1960, this court set this cause for hearing and appellant expressly waived oral argument because the issues are similar to those heretofore decided in Taylor vs. Taylor, 185 Kan. 324, and the lawyers for the appellee and amicus curiae did not appear for argument.

5. On May 12, 1960, this court entered an order continuing said cause.

6. That the practical effect of the order of the District Court of Johnson County, Kansas, is that it takes away appellant's Kansas license for the sole reason that he also practices law in Missouri. The order of the District Court

[fol. 21] of Johnson County, Kansas, has deprived appellant of his right to earn a livelihood as a Kansas lawyer and has deprived him of his right to engage in his profession as a Kansas lawyer. The order is, therefore, a deprivation of appellant's rights as guaranteed by the Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution.

7. It is respectfully submitted that in view of the serious consequences of the lower court's order, the appellant is entitled to an order from this court staying the judgment of the District Court of Johnson County, Kansas, until said cause can be finally determined by this appeal. It is further submitted that such a stay order is in keeping with the tradition of this court which has always stayed the judgments of inferior courts when said judgments have deprived a litigant of his basic rights or freedoms.

Respectfully submitted,

Payne, Jones & Payne, By Howard E. Payne, 122 East Park, Olathe, Kansas, Attorneys for Appellant.

Affidavit of Service (omitted in printing).

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[fol. 22]

In the Supreme Court of the State of Kansas

Minute Entry of Order Denying Motion for Stay of Judgment of District Court—June 3, 1960

Motion by Appellant for stay of judgment of district court is Denied.

[fol. 23]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,026

---

KEITH MARTIN, Appellant,

v.

JOSEPH S. DAVIS as Probate Judge of Johnson County, Kansas, Appellee.

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SYLLABUS BY THE COURT

1. Under Article 3, Section 1 of the Constitution of Kansas the supreme court stands at the head of the judicial department and is invested with inherent power arising from its creation, or from the fact that it is a court, which power is essential to its being and dignity, and does not require an express grant to confer it.

2. Inherent power is not an arbitrary and despotic power to be exercised at the pleasure of the court, or because of passion, prejudice, or personal hostility; rather, it is one to be used with moderation and caution in the exercise of sound judicial discretion.

3. The practice of the law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government.

4. Under Article 3, Section 1 of the Constitution of Kansas, the supreme court has the inherent power to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in [fol. 24] or out of court, and statutory regulations are effective and directory only when they accord with the inherent power of the judiciary.

5. The supreme court's legitimate concern for maintaining high standards for the practice of the law and the ad-

ministration of justice extends beyond the initial licensing of attorneys and, when admitted to the Bar, they are amenable to the rules and discipline of the court in all matters of order and procedure and to the continuing supervision and control of the practice of the law not in conflict with the federal and state constitutions.

6. No final judgment results when the supreme court admits an applicant to the Bar of the state of Kansas; a license or privilege is merely conferred upon the applicant to engage in the practice of law subject to the conditions prescribed in paragraph 5 of the syllabus.

7. While the police power is generally considered an exclusive power of the legislature, it may be exercised by courts.

8. Rules 41 and 54 of the supreme court, amended December 15, 1958, providing in substance that an attorney admitted to the Bar of Kansas who has been admitted to the Bar of another state and who is regularly engaged in the practice of law in that state shall associate local counsel before he can appear in the courts or before boards or commissions of Kansas, were adopted to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a Kansas licensed attorney who is regularly engaged in the practice of law in another state.

9. Rules referred to in paragraph 8 of the syllabus are [fol. 25] examined, and it is *held*: The rules are a proper and valid exercise of the inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, and, as applied to the appellant, they do not deny him due process of the law or the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, as more fully set forth in the opinion.

Appeal from Johnson district court, division No. 1; Earl E. O'Connor, judge. Opinion filed December 10, 1960. Affirmed.

*Keith Martin*, of Kansas City, Missouri, and Mission, Kansas, argued the cause *pro se*, and *Howard E. Payne*, *W. C. Jones* and *H. Thomas Payne*, of Olathe, were with him on the briefs for appellant.

*John J. Gardner*, County Attorney, of Olathe, argued the cause and was on the briefs for appellee.

*D. B. Lang*, of counsel, Bar Association of Kansas, of Scott City, *James E. Fussell*, of counsel, Leavenworth County Bar Association, of Leavenworth, and *Willard L. Phillips*, *James K. Cubbison*, *Lee E. Weeks*, *Edward M. Boddington, Sr.*, *Charles F. Williams*, *Joseph T. Carey* and *Bernard W. Alden*, all of Kansas City, were on the briefs of the Wyandotte County Bar Association as *amicus curiae*.

*George A. Lowe*, *Eugene T. Hackler*, *Roy S. Lowe*, *Hugh H. Kreamer* and *James H. Bradley*, of Olathe, and *Bernis G. Terry*, of Mission, were on the briefs of the Johnson County Bar Association as *amicus curiae*.

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[fol. 26]

OPINION—Filed December 10, 1960

The opinion of the court was delivered by

FATZER, J.: At issue is the power of the supreme court of Kansas to control and supervise the practice of law before the courts of the state by Kansas licensed attorneys regularly engaged in the practice of law in another state.

The action was one in mandamus to compel the appellee, the probate judge of Johnson County, Kansas, to permit the plaintiff, Keith Martin, to file cases in that court and to appear and try them without the appearance or association of local counsel as required by Rules 41 and 54 of this court, amended December 15, 1958, and to declare those rules unconstitutional and void as contravening the Fourteenth Amendment to the Constitution of the United States. The district court quashed the alternative writ and the plaintiff appealed. The principal question presented was before this court in *Taylor* v. *Taylor*, 185 Kan. 324, 342 P. 2d 190, *certiorari* denied 361 U.S. 374, 4 L. Ed. 2d 380, 80 S. Ct. 401, and was decided adversely to the appellant.

In the interest of brevity Rules 41 and 54, and G.S. 1949, 7-104 therein referred to, are not set forth since the portions here pertinent were quoted at length in *Taylor* v. *Taylor*, supra, pp. 326 and 327, and are incorporated in this opinion by reference. Suffice it to say those rules, as amended, provide in substance that an attorney admitted to the Bar of Kansas who has been admitted to the Bar of another state and who is regularly engaged in the practice of law in that state shall associate local counsel before he can appear in the courts or before boards or commissions of Kansas. While rules of the supreme court form no part of the statutory law of the state, the revisor of statutes publishes them in the general statutes, and the reader may find Rule 41 as G.S. 1959 Supp., 7-122, and Rule 54 as G.S. 1959 Supp., 60-3827.

The petition alleged that the appellant was graduated from the University of Kansas Law School in 1947 and almost immediately thereafter, in August 1947, was duly [fol. 27] licensed to practice law in the state of Missouri, and since that time has regularly practiced law and maintained his office in the Bryant Building, Kansas City, Jackson County, Missouri. On February 12, 1948, he was admitted to practice law before the supreme court of Kansas and all inferior courts, and since April 1948 has continuously maintained an office and his residence in Mission, Johnson County, Kansas.

The appellant alleged he is engaged in the general practice of law and that his clients frequently live in one county and either work or have business connections in another county and state and that their problems involve the laws and procedures of Kansas and Missouri, and that his knowledge of the laws and procedures and his ability to practice in either state have been of assistance to him in obtaining clients and in being able to give them counsel and court representation; that he consults with as many clients in his Kansas office or home as in his Missouri office although most of his office work is performed in his Missouri office; that he has represented the State Highway Commission in litigation in Kansas courts and has tried as many litigated matters in the courts of Kansas as in Missouri; that he has also tried cases in the federal courts of each state

and has argued cases in the appellate courts of each state as well as the United States Circuit Court of Appeals for the Eighth and Tenth Circuits; that since 1951 he has been attorney for the city of Mission and is presently a member of the State Board of Tax Appeals of Kansas; that he wrote an article on Kansas Procedure published in 6 Kansas Law Review, p. 134, and that he has been and is a member of the state and local Bar associations of Kansas and Missouri.

Martin alleged that his net income from the practice of law exceeded $15,000 per year and that approximately one half of that sum has been earned in Kansas and has been so reported on his Kansas state income tax returns; that a large portion of his income is derived from his appearances in the defendant's court which has jurisdiction of adoptions and decedents' estates; that the minimum fee schedules of the Johnson and Wyandotte County Bar As- [fol. 28] sociations require that local counsel be compensated approximately one-third to one-half of the fee for the particular litigation; that prior to the amending of Rules 41 and 54 and the decision in the Taylor case, *supra*, he regularly appeared for clients without the appearance and association of local counsel but that subsequent thereto the defendant has not allowed him to appear and try cases in the probate court of Johnson County unless he has local counsel associated with him, and the defendant has informed him that in the future he cannot appear as attorney for clients without the appearance and association of local counsel as required by Rules 41 and 54.

Martin alleged that Rules 41 and 54 are vague, arbitrary and without standards and have caused his Kansas license to be in fact a nullity as long as he practices law "regularly" in Missouri; that those rules not only deprive him of part of his income from his Kansas practice but also discourage clients from seeking his services; that because he cannot represent them in Kansas courts without the appearance of another lawyer, they have come to believe he cannot counsel them regarding Kansas law or represent them in Kansas courts; that the amended rules place him in the category of a foreign attorney as referred to in G.S. 1949, 7-104, and render his Kansas license inopera-

tive so long as he "regularly" practices in Missouri unless he has another Kansas lawyer associated and appearing with him; that he has continuously listed and maintained telephones in his offices in Kansas and Missouri and his residence, and that since 1948 Kansas lawyers have obtained service of pleadings upon him by mailing them to his Kansas office or residence or have left them at either place.

Martin alleged that the amended rules deny him due process and equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States and that unless the defendant allows him to appear in the probate court of Johnson County in all cases now pending and all future cases without the appearance and association of local counsel he will lose clients and a substantial part of his income and will be deprived of the right [fol. 29] to practice his profession in the defendant's court. Further, that his Kansas license granted him the right to appear in the supreme court and in all inferior courts including the court presided over by the defendant.

Martin further alleged that he had no adequate remedy at law, that as a matter of right he was entitled to file cases in the defendant's court and try them without appearance and association of local counsel; that he has suffered and will suffer irreparable injury if the defendant is not compelled to permit him to file and try lawsuits without appearance and association of local counsel. The prayer was that the relief sought be granted and that amended Rules 41 and 54 and G.S. 1949, 7-104 be declared unconstitutional and void.

The defendant, appearing by the county attorney of Johnson County, filed a motion to quash the alternative writ upon the ground that neither the writ nor the petition alleged facts showing that Martin was entitled to the relief sought.

Prior to hearing the matter, the Johnson County Bar Association filed an application to intervene as *amicus curiae* upon the ground that the questions raised were of interest and concern to that association and it was granted leave to file such pleadings as it deemed proper. The committee on Unauthorized Practice of the Law of the Wyandotte County Bar Association made no application

to enter the case as *amicus curiae*, but did appear and offered assistance to the county attorney in the trial of the matter.

The district court sustained the defendant's motion to quash the alternative writ, and Martin duly perfected this appeal.

Before discussing the legal questions here presented it should be noted that during the pendency of this appeal the committee on Unauthorized Practice of the Law of the Wyandotte County Bar Association made application and was granted leave to file its brief as *amicus curiae* in support of the district court's judgment. The Leavenworth County Bar Association and the Bar Association of the [fol. 30] State of Kansas joined in that brief. Likewise, the committee on Unauthorized Practice of the Law of the Johnson County Bar Association asked for and was granted leave to file its brief as *amicus curiae* for the same purpose.

When this case was heard on the merits, the appellant argued that this court does not have power to adopt rules relating to the admission of applicants to the Bar, or to regulate and control the practice of law by attorneys previously admitted, hence, Rules 41 and 54 are ineffective and meaningless. The contention is without merit. The constitution of Kansas distinctly distributes the powers of the government to the executive, legislative and judicial departments. Under Article 3, Section 1 the judicial power is vested in a supreme court, district courts, probate courts, justice of the peace, and such other courts, inferior to the supreme court, as may be provided by law. Under that provision of the constitution, the supreme court stands at the head of the judicial department (*Householder* v. *Morrill*, 55 Kan. 317, 40 P. 664) and is invested with inherent power arising from its creation, or from the fact that it is a court. Inherent power is essential to its being and dignity, and does not require an express grant to confer it (*Petition of Florida State Bar Ass'n*, 40 So. 2d 902). It is not an arbitrary and despotic power to be exercised at the pleasure of the court, or because of passion, prejudice or personal hostility; rather, it is one to be used with moderation and caution in the exercise of sound judicial discretion (7 C.J.S., Attorney and Client, § 18, p. 729).

It is unnecessary here to explore the limits of judicial power conferred by that provision, but suffice it to say the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government (*In re Integration of Nebraska State Bar Ass'n*, 133 Nebr. 283, 275 N.W. 265, 114 A.L.R. 151). In- [fol. 31] cluded in that power is the supreme court's inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare (*The People* v. *Goodman*, 366 Ill. 346, 8 N.E. 2d 941, 111 A.L.R. 1; *Integration of Bar Case*, 244 Wis. 8, 11 N.W. 2d 604, 151 A.L.R. 586; 5 Am. Jur., Attorneys at Law, § 2). It follows that the power of the supreme court to make reasonable rules for those purposes is not open to question (*Peyton's Appeal*, 12 Kan. 398; *Faelin* v. *Sook*, 30 Kan. 401, 1 P. 123; *In re Smith*, 73 Kan. 743, 85 P. 584; *In re Wilson*, 79 Kan. 450, 100 P. 75; *In re Gorsuch*, 113 Kan. 380, 214 P. 794; *In re Hanson*, 134 Kan. 165, 5 P. 2d 1088; *State, ex rel.*, v. *Perkins*, 138 Kan. 399, 28 P. 2d 765; *Depew* v. *Wichita Association of Credit Men*, 142 Kan. 403, 49 P.2d 1041; *State, ex rel.*, v. *Schmitt*, 174 Kan. 581, 258 P.2d 228; *Taylor* v. *Taylor*, supra).

The appellant next contends that when he was admitted to the Bar of this court in 1948 Rules 41 and 54 did not require him to associate local counsel as a condition to his appearance in courts of the state, and argues that the amendments in December 1958 operate to suspend his right to practice law in Kansas because he regularly practices in another state. He further contends that the court's order admitting him to practice was a final judgment and conditions not a part of that judgment cannot be subsequently imposed. The contentions lack substance. Attorneys at law are a specially qualified class of persons for the purpose of assisting the state and its tribunals to administer justice. While they do not hold an office or public trust in a constitutional or statutory sense, they are, because of their close

intimate relationship to the courts, an important part of the judicial system of the state and are "officers of the court" (*In re Gorsuch*, supra; *In re Hanson*, supra; *State, ex rel.*, v. *Perkins*, supra; *Depew* v. *Wichita Association of Credit Men*, supra). Although G.S. 1949, 7-102 provides who may be admitted to practice in all the courts of the state upon taking the oath prescribed, the statutory regulation [fol. 32] is effective and directory only when it accords with the inherent power of the judiciary because the licensees are officers of the court (*Depew* v. *Wichita Association of Credit Men*, supra, p. 406).

The supreme court's legitimate concern for maintaining high standards for the practice of the law and the administration of justice extends beyond the initial licensing of attorneys. Without the power of supervision and control, the initial examination would afford little, if any, opportunity to determine the continuing qualifications of attorneys practicing before it and the inferior courts of the state, or when the privilege of practicing law has been forfeited. When admitted to the Bar, attorneys at law become amenable to the rules and discipline of the court in all matters of order and procedure and to the supervision and control of the practice of law not in conflict with the constitution. Since the rules in question operate uniformly upon all members of the Bar from the time of their adoption, the appellant, like all other attorneys who become subject to their provisions, was bound to comply with them in his practice of the law in this state. Moreover, no final judgment resulted when he was admitted to the Bar—a license or privilege was merely conferred upon him to engage in the practice of law (*In re Casebier*, 129 Kan. 853, 855, 284 P. 611; *In re Hanson*, supra) for the term of his life or until disbarred by a court of competent jurisdiction (*Hanson* v. *Grattan*, 84 Kan. 843, 115 P. 648). The practice of the law has been defined in *State, ex rel.*, v. *Perkins*, supra, and *Depew* v. *Wichita Association of Credit Men*, supra, p. 408, and both cases recognize that it does not only include appearances in court on litigated matters, but covers services rendered to a client in advising him of his rights. See, also, *State, ex rel.*, v. *Schmitt*, supra, p. 588. Hence the appellant, although he regularly

practices law in Missouri, is not prohibited from practicing law in Kansas by counseling and advising his clients, or preparing documents requiring knowledge of legal principles not possessed by a layman, or of advising the city officials, as city attorney. Neither is he prohibited from practicing before the courts and tribunals of this state whenever he wishes—he has only to comply with the condition imposed of associating with local counsel. In *Taylor* v. [fol. 33] *Taylor*, supra, it was said:

> " . . . Martin's license to practice law before the courts of the state of Kansas has not been in dispute nor has he been disbarred. . . . " (l.c. 328.)

Clearly, Rules 41 and 54 do not revoke or suspend the appellant's license or right to practice law in this state, nor did they change the provisions of the statutory law (G.S. 1949, 7-104); their practical effect was to extend the statute's coverage to include those members of the Kansas Bar who regularly engage in the practice of law in another state.

We now turn to the principal question, whether Rules 41 and 54 violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The appellant contends that, as applied to him, they lack a rational connection between the grounds for "suspension" of his license and qualifications *essential* to the practice of law, and, between the "suspension" of his license and *any* objective the court might legitimately attain in the exercise of its power to maintain the standards of the Bar, and relies upon *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 1 L.Ed. 2d 796, 77 S.Ct. 752; *Konigsberg* v. *State Bar*, 353 U.S. 252, 1 L.Ed. 2d 810, 77 S.Ct. 722 and *In re Patterson*, 353 U.S. 952, 1 L.Ed. 2d 906, 77 S.Ct. 869. We are cognizant of what was said and held in those cases, but they do not control the question presented.

When this court adopted the amendments to Rules 41 and 54 it was aware of and took judicial notice of the following: Wyandotte and Johnson Counties in Kansas lie along the state line opposite Jackson County, Missouri, and contain

a combined area approximately equal to that of Jackson County. Wyandotte County ranks second in population in Kansas and Johnson County ranks fourth. Those three counties, Jackson, Wyandotte and Johnson, make up the greater part of one metropolitan area which has a population of about one million. The largest of the downtown [fol. 34] areas of the Kansas Cities is in Missouri where approximately 2100 practicing attorneys maintain their offices. Of that number, an estimated 300 are Kansas licensed attorneys who reside in Kansas but who regularly practice in Missouri. Some of them, however, maintain an individual part-time practice in Johnson and Wyandotte Counties, are listed in the telephone directory, and, like the appellant, have their names on office doors of, and share office space with, accountants, architects, dentists and real estate brokers. There are approximately 200 active resident practicing attorneys maintaining offices in Wyandotte County and approximately 90 active resident practicing attorneys maintaining offices in Johnson County. Thus, the largest number of practicing attorneys—seven to one—are officed on the Missouri side.

On the Kansas side, in the diked bottom land lying along the Kansas and Missouri Rivers, are located the large industrial areas which include all of the large packing plants, stockyards, a Fiberglass industry, an oil refinery, a motor assembly plant, and many other hazardous industries. Accordingly, a greater number of accidents in the workmen's compensation and personal injury field occur in Kansas. Litigation arising from those accidents is controlled by Kansas law and falls within the jurisdiction of the Kansas courts.

In the workmen's compensation field alone the volume of business conducted by the courts and commissions in Wyandotte and Johnson Counties runs on a weekly average of 80 to 100 cases, with approximately 40 to 50 percent represented by Kansas City, Missouri, attorneys having local Kansas counsel associated with them. In addition to workmen's compensation cases, Wyandotte County, with four divisions of its district court at Kansas City, Kansas, had an average case load of 2500 to 2600 civil and 350 to 400 criminal cases per year. Its city court, with two divisions,

had a case load of approximately 3900 civil cases and from 900 to 950 preliminary hearings in criminal cases per year, including misdemeanors. Its probate court had an extremely heavy docket of proceedings relating to decedents' estates as well as many guardianship cases, and it also had [fol. 25] an extensive case load in its juvenile division. The Johnson County District Court, with four divisions at Olathe, had an average case load of approximately 900 to 1000 civil and approximately 100 criminal cases per year. Like Wyandotte County, its probate court had an extensive case load of decedents' estates as well as guardianship proceedings and other matters, and its magistrate court handled in excess of 1000 cases per year.

In the main, that litigation was handled by attorneys falling within four distinct categories: resident Missouri attorneys who associated local Kansas counsel as required by G.S. 1949, 7-104; resident Kansas attorneys maintaining offices in Wyandotte and Johnson Counties; resident Kansas attorneys regularly practicing in Missouri who associated local Kansas counsel, and resident Kansas attorneys who maintained a part-time practice in Kansas but who regularly practiced law and maintained their principal offices in Missouri.

From the totality of the foregoing, Kansas courts and commissions encountered difficulty in procuring the presence of the Kansas licensed attorneys officed in Missouri at the call of the court's and the commission's dockets; in the inability of Kansas officed attorneys to procure service on Missouri officed Kansas attorneys without having to proceed to another state; in the failure of some Kansas licensed attorneys officed in Missouri to answer calls to appear on matters of urgency, and in the failure of those attorneys to familiarize themselves with the rules of local practice and procedure by reason of their infrequent appearance before the courts and tribunals. Altogether too frequently, the courts were faced with the necessity of deciding a case on some technicality caused by the violation of rules established for the practice before the Kansas courts and commissions and because of conflicting statutory provisions between the states of Kansas and Missouri with respect to different periods of general statute limitations

(Missouri Revised Statutes 516.110, § 1, *et seq.*; G.S. 1949, 60-306) and limitations relating to master and servant (see, generally, Missouri Revised Statutes, 287.430; G.S. 1959 Supp., 44-520a).

[fol. 36] In carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regrettably, that some one of them may work a hardship on some member or group of members of the Bar. The appellant alleges such a hardship, but, as we have seen, the rules in question were directed to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a Kansas licensed attorney who is regularly engaged in the practice of law in another state. While the police power is generally considered an exclusive power of the legislature, it may, for reasons not necessary to detail here, be exercised by the courts (*Workmen's Compensation Board* v. *Abbott*, 212 Ky. 123, 278 S.W. 533, 47 A.L.R. 789; *Petition of Florida State Bar Ass'n*, 40 So. 2d 902).

It is within the permissible function of the state through the supreme court to classify members of the Bar when a real, logical and substantial basis exists for the classification. The equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority. That clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned (*Louisville & Nashville R.R.* v. *Melton*, 218 U.S. 36, 54 L.Ed. 921, 30 S.Ct. 676). There is no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 294, 42 L.Ed. 1037, 18 S.Ct. 594). A state has a wide range of discretion in distinguishing, selecting and classifying, and it has been held that it was sufficient to satisfy the demand of the Constitution of the United States if a classification was practical and not

palpably arbitrary (*Orient Insurance Company* v. *Daggs*, 172 U.S. 557, 43 L.Ed. 552, 19 S.Ct. 281).

The same is true of the due process clause. The enjoyment [fol. 37] of property is subject to the exercise by the state of the police power, and the question whether what has been done amounts to a taking of property is whether such taking was pursuant to a valid exercise of that power (12 Am. Jur., Constitutional Law, § 652, p. 344), or, as in the instant case, the valid exercise of inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, which is the equivalent of the police power. Regulations are not unconstitutional merely because they operate as a restraint upon private rights of persons or property, or will result in a loss to individuals. The infliction of such loss is not a deprivation of property without due process of law—the exertion of the police power upon objects lying within its scope in a proper and lawful manner is due process of law. Hence, the police power may be exerted as a restraint upon private rights of persons or to regulate the use of property, and where appropriate or necessary, prohibit the use of property for certain purposes in aid of the public safety and general welfare, and constitutional limitations form no impediment to its exercise where the regulation is reasonable and bears a fair relationship to the object sought to be attained (*Schaake* v. *Dolley*, 85 Kan. 598, 118 P. 80, 37 L.R.A. [NS] 877; *Dey* v. *Knights & Ladies of Security*, 113 Kan. 86, 213 P. 1066; *McNaughton* v. *Johnson*, 242 U.S. 344, 61 L.Ed. 352, 37 S.Ct. 178; *State* v. *Mugler*, 29 Kan. 252, 123 U.S. 623, 31 L.Ed. 205, 8 S.Ct. 273; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.Ed. 369, 31 S.Ct. 337; *Armour & Co.* v. *North Dakota*, 240 U.S. 510, 60 L.Ed. 771, 36 S.Ct. 440).

When those general principles are applied to the appellant's argument that the classification made is arbitrary, without standard and unreasonable, we think they are decisive against the contention. The classification encompasses members of the Kansas Bar regularly engaged in the practice of law in another state, and is a natural one. The difference between that group of attorneys, who are required to associate local counsel, and resident members

of the Kansas Bar, who are not so required, rests upon a consideration which is real as distinguished from one which is fanciful, and has a direct and substantial relation to the [fol. 38] object to be attained—the removal of obstacles to a greater public welfare, that is, delays in the orderly administration of justice by Kansas courts and commissions, and, also, to provide litigants in those tribunals with the service of a resident attorney familiar with local rules, procedure and practice and upon whom service may be had in all matters connected with actions or proceedings proper to be served upon an attorney of record.

We think the classification is further justified upon the consideration that in the past decade or so the manner in which law is practiced has tended to swing with emphasis to the specialist. There has developed much new and complex law which has had and will continue to have a profound effect upon the general practice of the law. Those complexities have led to Trial Lawyers versus Office Lawyers; the development of law firms by congregation of specialists; the use of lawyers in trust and title companies, and strong corporate legal departments. Litigation invokes statutory laws, rules of courts, and peculiarities of local practice requiring special knowledge and opinions. Such matters are best handled by a local attorney who constantly deals with problems arising in a variety of situations. Trial work requires immediate decisions—there is little time for reflections and research. Only the lawyer with considerable experience in a particular forum can adequately and consistently render high-level service in the area of local procedure. It is highly desirable that the legal profession recognize those developments, understand them, and adjust as needed so the public will be adequately protected and the profession strengthened and not weakened.

While the appellant alleges a loss of income as a result of the rules and also that they have discouraged clients from seeking his services because they have come to believe he cannot counsel them or represent them in Kansas courts, nonetheless his regular practice of the law in Missouri has placed him within the classification provided and he is in that group by his own selection and volition. He has not [fol. 39] been singled out or made an example of (*Taylor* v.

*Taylor*, supra, p. 328), nor has he been discriminated against. He is not the only Kansas licensed attorney affected—any member of the Kansas Bar who, like the appellant, regularly engages in the practice of law in another state is bound to comply with the rules. Neither does the fact that his home is in Kansas where he keeps the Kansas reports; that he shares office space with an accountant where he keeps the general statutes of Kansas; that he has attained high scholastic achievements; that he is the author of an article on Kansas procedure, and is a respected member of the Local and State Bar Associations lessen the binding effect of the rules as applied to him. Looking at all the circumstances that attend, we cannot say that the object sought to be accomplished by the rules presents a clear, unmistakable infringement of the appellant's rights secured by the fundamental law (*Murphy* v. *California*, 225 U.S. 623, 56 L.Ed. 1229, 32 S.Ct. 697, 41 L.R.A. [NS] 153).

During the pendency of this appeal the appellant made application to file the same brief as he filed as counsel for the appellant in the Taylor case, *supra*, which was allowed. The same point of law presented in that appeal is presented and reargued here, the only difference being that in the instant appeal the appellant was the plaintiff below. It was held in the Taylor case that he was not denied due process of law or the equal protection of the law, and we reaffirm that holding. This opinion is concluded with the observation there is no substantial and fair ground to say that the rules in question make an unreasonable and unfounded classification thereby denying to the appellant due process of law or the equal protection of the law.

The judgment is affirmed.

[fol. 40] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,026

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed December 31, 1960

1. Notice is hereby given that Keith Martin, the above named appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Kansas of December 10, 1960, affirming the judgment of the District Court of Johnson County, Kansas, Division 1, of March 4, 1960, dismissing appellant's petition and alternative writ of mandamus.

This appeal is taken pursuant to 28 U.S.C.A. Section 1257 (2).

2. The clerk will prepare transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

(a) The abstract of the proceedings in the trial court filed by appellant, Keith Martin.

(b) Motion to stay the judgment of trial court and order of Supreme Court of Kansas denying stay.

(c) Judgment and Opinion of Supreme Court of Kansas of December 10, 1960, affirming judgment of trial court.

(d) Notice of Appeal from Supreme Court of Kansas to Supreme Court of the United States.

3. The following question is presented by this appeal: [fol. 41] Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States, may an attorney who has been regularly admitted to practice in the state of his residence and who has maintained an office and active practice in that state since the date of his admission be denied, by subsequently promulgated court rules, the right to appear as

counsel in the courts and before commissions and boards of that state unless he associates and has appearing with him "local counsel" as if he were a nonresident, unlicensed attorney, for the sole reason that in addition to his practice and office in the state of his residence he also maintains an office and practice in an adjoining state?

Howard E. Payne, Attorney for Appellant, 122 East Park, Olathe, Kansas.

Affidavit of Service (omitted in printing).

[fol. 43] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 44]

SUPREME COURT OF THE UNITED STATES

No. 635—October Term, 1960

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KEITH MARTIN, Appellant,

vs.

JOSEPH S. DAVIS, as Probate Judge of Johnson County, Kansas.

---

ORDER NOTING PROBABLE JURISDICTION—March 27, 1961

Appeal from the Supreme Court of the State of Kansas.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

[fol. 45]

SUPREME COURT OF THE UNITED STATES

No. 635—October Term, 1960

---

KEITH MARTIN, Appellant,

vs.

JOSEPH S. DAVIS, as Probate Judge of Johnson County, Kansas.

---

ORDER OF SUBSTITUTION—May 8, 1961

On Consideration of the motion to substitute Herbert Walton in the place of Joseph S. Davis as the party appellee in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Office Supreme Court, U.S.
FILED
JAN 7 1961
JAMES R. BROWNING, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 30

KEITH MARTIN,
*Appellant,*

vs.

JOSEPH S. DAVIS AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS,
*Appellee.*

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

## JURISDICTIONAL STATEMENT.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. .

KEITH MARTIN,
*Appellant,*

vs.

JOSEPH S. DAVIS AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS,
*Appellee.*

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

## STATEMENT AS TO JURISDICTION.

Appellant appeals from a judgment of the Supreme Court of Kansas entered on December 10, 1960, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW.

The opinion of the Supreme Court of Kansas (Appendix A, *infra*, pp. A1-A20) is not yet reported. The journal entry of the Kansas District court dismissing the appellant's alternative writ of mandamus (Appendix B, *infra*, p. A21) is unreported.

## BASIS OF JURISDICTION.

(i) This was an action in mandamus brought in the District Court of Johnson County, Kansas, to compel the appellee, the probate judge of Johnson County, Kansas, to permit the appellant, Keith Martin, who has been regularly admitted to practice law in Kansas, to file cases in that court and to appear and try them without the appearance or association of local counsel as required by Rules 41 and 54 of the Supreme Court of Kansas, as amended December 15, 1958.

(ii) An order was made by the Johnson County District Court on March 4, 1960, dismissing appellant's petition and alternative writ of mandamus. An appeal was taken from the ruling of March 4, 1960, to the Supreme Court of Kansas. The judgment of the Supreme Court of Kansas adverse to the appellant was entered on December 10, 1960. No motion for rehearing was filed. Notice of appeal to the Supreme Court of the United States was timely filed with the Kansas Supreme Court on December 31, 1960.

(iii) The jurisdiction of the United States to review this decision by appeal is conferred by 28 U.S.C. 1257(2). There was drawn in question the validity of amended Rules 41 and 54 of the Supreme Court of Kansas on the ground

of their being repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.[1] The decision of the Supreme Court of Kansas was in favor of their validity.

(*iv*) The following decisions sustain the jurisdiction of this Court to review the judgment of the Supreme Court of Kansas: *Hamilton* v. *Regents*, 293 U.S. 245; *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Ex parte Garland*, 4 Wall. 333; *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Morey* v *Doud*, 354 U.S. 457; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389; *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522.

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1. For the purpose of conferring appellate jurisdiction on the Supreme Court of the United States, amended Rules 41 and 54 are to be treated as statutory within the meaning of 28 U.S.C. 1257(2). In *Hamilton* v. *Regents*, 293 U.S. 245, 258, it is held that "The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making power." The sources of the Kansas court's authority are discussed briefly in *Taylor* v. *Taylor*, 185 Kan. 324, 326, 342 P.2d 190 (1959), as follows:

> "Under the judicial power that is given to it by article 3, section 1, of our state constitution, this court has from time to time promulgated necessary rules for the examination of applicants for admission to the bar of this state (G.S. 1949, 7-103). These rules of the Supreme Court, while not statutory law, appear under G.S. 1949, 7-122, and in the forepart of certain volumes of our Kansas Reports. The latest appearance is found in 183 Kan. xi, *et seq.*, and the particular rules in question here are No. 41 and No. 54 which were amended on December 15, 1958."

The authority of the Kansas court to issue rules under the above authority is also discussed briefly in the opinion below (See Appendix A, *infra*, pp. 9-10).

## QUESTION PRESENTED.

Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States, may an attorney who has been regularly admitted to practice law in the state of his residence and who has maintained an office and active practice in that state since the date of his admission, be denied, by subsequently promulgated court rules, the right to appear as counsel in the courts or before boards and commissions of that state unless he associates and has appearing with him "local counsel," as if he were a non-resident, unlicensed attorney, for the sole reason that, in addition to his practice and office in the state of his residence, he also maintains an office and practice in an adjoining state?

## STATUTES INVOLVED.

The relevant provisions of the 1949 Kansas General Statutes and the Kansas Supreme Court Rules, as amended December 15, 1958, are as follows:

> Kan. G.S., 1949, 7-104. *Attorneys from other states.* Any regularly admitted practicing attorney in the courts of record of another state or territory, having professional business in the courts or before any board, department, commission or other administrative tribunal or agency, of this state, may on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon taking the oath as aforesaid and upon it being made to appear by a written showing filed therein, that he has associated and personally appearing with him in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state, upon whom serv-

ice may be had in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on such foreign attorney, within this state, and such foreign attorney shall thereupon be and become subject to the order of, and amenable to disciplinary action by the courts, agencies or tribunals of this state: *Provided*, That in all actions before a court of record, said associate attorney shall be a resident of and maintain his law office within the judicial district in which said action is filed or pending. No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this section: *Provided*, Nothing in this section shall be construed to prohibit any party from appearing before any of said courts, tribunals or agencies, in his own proper person and on his own behalf.

Rule No. 41. *Admission to Practice.* As soon as practicable after the completion of an examination, the board shall file a report with the clerk of the court recommending the granting of the denial of the petition of the applicant. Whenever such report shall recommend the granting of a petition, unless some reason shall appear to the contrary, the court will make an order admitting the applicant to practice in all the courts of the state, which order shall become effective upon his taking an oath in open court, the form of which shall be in substance as follows:

> You do solemnly swear that you will support and bear true allegiance to the constitution of the United States and the constitution of the State of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of, any falsehood in court; and that you will discharge your duties as an

attorney and counselor of the Supreme Court and all inferior courts of the state of Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability, so help you, God.

Upon the making of such order the clerk shall issue to such applicant a certificate of his authority to practice law in this and all inferior courts of the state, upon his signing his name on the roll of attorneys of this court. Whenever the board shall recommend a denial of the petition, an order will be made to that effect.

*Provided further however, The authority granted to practice law shall not be exercised except as provided under Rule No. 54 infra, when the licensee herein has been admitted to the Bar of another state or territory and is regularly engaged in the practice of law in such other state or territory.* (Emphasis added).

(The foregoing italicized paragraph was added by amendment on December 15, 1958.)

Rule No. 54. An attorney regularly practicing outside of this state and in good standing as a member of the bar of the place of his regular practice may be recognized as an attorney by the courts, commissions, and agencies of this state, for any action or proceeding, but only if he has associated with him as attorney of record in such action or proceeding a member of the Bar of this state qualified under the provisions of G.S. 1949, 7-104, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record.

(Prior to its amendment on December 15, 1958, Rule 54 referred to an attorney "*residing* outside of this state in good standing as an attorney at the place of his *residence*," rather than the above. (Emphasis added.))

## STATEMENT.

This matter has previously been before this Court in another context, *Taylor* v. *Taylor*, No. 552, 1959 Term, appeal dismissed, 361 U.S. 374. As background for the instant proceeding, the *Taylor* case is briefly reviewed:

On March 10, 1959, a petition for divorce was filed in the Wyandotte County District Court of Kansas by Keith Martin, a member of the Kansas Bar and appellant in the instant case, as attorney for Margaret Taylor. The defendant in that suit moved to strike the petition on the ground that Martin was a member in good standing of the Missouri Bar and regularly practiced in Missouri, and that he therefore had no authority to file such petition without the association of an attorney of record who was a member of the bar of the State of Kansas as required by amended Rules 41 and 54 of the Kansas Supreme Court. Upon Martin's failure to comply with the trial court's order that he obtain local counsel, Mrs. Taylor's petition was dismissed. Mrs. Taylor appealed to the Kansas Supreme Court contending, *inter alia*, that the application of amended Rules 41 and 54 to her attorney deprived him of due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution. The Kansas Supreme Court sustained the constitutionality of amended Rules 41 and 54 as applied to Martin, and affirmed the order of the trial court. *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190. On further appeal to this Court, the appeal was dismissed. No. 552, 1959 Term, 361 U.S. 374.

Believing that this Court may have dismissed the *Taylor* appeal because of the rule of *Tileston* v. *Ullman*, 318 U.S. 44, or because of possibilities of mootness,

Martin returned to the Kansas courts. On February 29, 1960, appellant Martin filed a petition for a writ of mandamus in the Johnson County District Court of Kansas praying that the appellee judge of the Probate Court of Johnson County, Kansas, be compelled to allow appellant to file cases in that court and to appear and try such cases without the appearance or association of local counsel and without regard to amended Rules 41 and 54 of the Supreme Court of Kansas or to Kan. G.S. 1949, 7-104, and in accordance with the license granted to him by the Kansas Supreme Court (A. 2-9)[2]. The petition further prayed that amended Rules 41 and 54 and G.S. 1949, 7-104, be declared to be in violation of the Fourteenth Amendment of the United States Constitution as applied to appellant.

Appellant's petition alleged that he had been regularly admitted to practice in the State of Kansas on February 12, 1948, and that from that date to December 15, 1958, he had regularly appeared for clients in the Probate Court of Johnson County, Kansas, without association of "local counsel." Appellant also alleged that subsequent to the promulgation of amended Rules 41 and 54 on December 15, 1958 and the decision of *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 290 (1959), discussed above, appellee judge had not allowed appellant to appear in said court without the association of "local counsel", and had informed appellant that in the future he could not appear in defendant's court for clients without the appearance and association of "local counsel."

After the district court issued an alternative writ directing appellee judge to permit appellant to appear without

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2. References to the abstract of appellant, filed with the Supreme Court of Kansas and included in the Record submitted to this Court, are designated "A."

the association of another Kansas lawyer or to show cause to the contrary, appellee filed a motion to quash the writ for the reason that neither the petition nor the writ itself stated a cause of action (A. 12). In its opinion after oral argument the district court declared that appellant's membership in the Missouri Bar and his regular practice in that state placed him squarely within the purview of amended Rules 41 and 54 requiring joinder of local counsel. The district court found that the facts relative to appellant were substantially the same as in *Taylor* v. *Taylor, supra,* and that that decision was determinative of the legal issues involved, including the constitutional questions (A. 14-16). Appellant's alternative writ was accordingly dismissed and appellant appealed.

According to the undisputed allegations of his petition, appellant was admitted to practice before the Kansas Supreme Court and all inferior courts on February 12, 1948, and is a duly licensed lawyer of the State of Kansas; he resides at 6200 West 61st Street in the City of Mission, Johnson County, Kansas. Prior to his admission he attended the public schools of Miami County, Kansas, and received his A.B. (1942) and LL.B (1947) degrees from the University of Kansas, and was elected to Phi Beta Kappa and Order of the Coif. He graduated from the Harvard Business School in September, 1946, with an M.B.A. degree. In 1943-45 he resided in Kansas City, Missouri, and was employed by the Pratt & Whitney Aircraft Corporation and attended night law school at the University of Kansas City. While attending Kansas University Law School in 1945-46 and 1946-47, he taught economics at Kansas University (A. 2-3).

Appellant was duly licensed to practice law in Missouri on August 2, 1947, and has since engaged in general practice in Missouri. He now maintains an office in the

Bryant Building, Kansas City, Jackson County, Missouri. He is a member of state and local bar associations of Missouri (A. 3-4).

Appellant has also engaged in general practice in Kansas since April, 1948, and since that date has continuously maintained an office in Mission, Kansas (a community just across the state line from Kansas City, Missouri). He has been City Attorney of Mission, Kansas, since 1951, and is a member of the State Board of Tax Appeals of Kansas. He has represented the State of Kansas in highway litigation in the Kansas courts. He wrote an article on Kansas procedure in the Third Survey of Kansas Law, 6 Kan. L. Rev. 134 (1957). He has argued cases in the Supreme Court of Kansas[3]. He is a member of state and local bar associations of Kansas (A. 3-4).

Appellant's petition further alleged that Jackson County, Missouri, and Johnson County, Kansas, in which he maintains his two offices, are contiguous counties; Wyandotte County, Kansas, is contiguous to each of the foregoing counties. The three counties are part of one metropolitan area and have a population of about one million. Appellant's clients frequently live in one county and either work or have business connections in another county and state. Their problems involve the laws and procedures of both states. His knowledge of the laws and procedures and his ability to practice in either state have been of assistance to him in obtaining clients and in being able to give them counsel

3. *State* v. *Sharp*, 174 Kan. 672, 258 P.2d 306; *State* v. *Fletcher*, 174 Kan. 530, 256 P.2d 847; *Rhea* v. *Kansas City Power & Light Co.*, 176 Kan. 674, 276 P.2d 741; *Lindbloom* v. *Lindbloom*, 177 Kan. 286, 279 P.2d 243; *State Highway Commission* v. *Abercrombie*, 185 Kan. 47, 340 P.2d 377.

and court representation. He consults with as many clients in his Kansas office or home as in his Missouri office, although most of his office work is performed in his Missouri office (A. 3-4).

Appellant's net income from his law practice exceeds $15,000 per year. Approximately one-half that sum has been earned from Kansas practice and has been so reported on his state income tax returns. A large proportion of his income is derived from court appearances including adoptions and the probate of estates of which the appellee's court has jurisdiction. Because he cannot represent clients in Kansas courts without the compulsory presence of another lawyer, clients have come to believe that he cannot counsel them regarding Kansas law or represent them in Kansas courts. He is therefore faced with the loss of a substantial portion of his income (A. 4-6).

According to the minimum fee schedules of the Johnson and Wyandotte County bar associations in Kansas, local counsel require compensation of approximately one-third to one-half of the fee for serving as local counsel. Amended Rules 41 and 54 require appellant to share his income with local counsel who frequently are not acquainted with the case in issue but are nevertheless required to be in court by the defendant because of amended Rules 41 and 54 (A. 5).

On appeal to the Supreme Court of Kansas, appellant urged that amended Rules 41 and 54 and G.S. 1949, 7-104, were in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution as applied to him. The Kansas Supreme Court rejected appellant's contention. It justified Rules 41 and 54 as applied retroactively to appellant by taking *judicial notice* of the following: that

there are six times as many lawyers practicing on the Missouri side as on the Kansas side of the Kansas City metropolitan area but that the bulk of industrial litigation occurs in Kansas courts; that difficulty has been experienced in serving process on, and securing the presence in court of, Missouri officed Kansas attorneys.[4] The court also found justification in the need for specialization. In regard to the constitutional issues the Kansas Court said:

> "We now turn to the principal question, whether Rules 41 and 54 violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The appellant contends that, as applied to him, they lack a rational connection between the grounds for 'suspension' of his license and qualifications *essential* to the practice of law, and, between the 'suspension' of his license and *any* objective the court might legitimately attain in the exercise of its power to maintain the standards of the Bar, and relies upon *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 1 L. Ed. 2d 796, 77 S. Ct. 752; *Knoigeberg* [*sic*] v. *State Bar*, 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 and *In re Patterson*, 353 U.S. 952, 1 L. Ed. 2d 906, 77 S. Ct. 869. We are cognizant of what was said and held in those cases, but they do not control the question presented (Appendix A, pp. 12-13).
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> "In carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regretably, that some one of them may work a hardship on some member or group of members of the Bar. The appellant alleges such a hardship, but, as we have seen, the rules in question were directed to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a Kansas licensed attorney who is

4. As to the legitimacy of such judicial notice, see discussion *infra*, pp. 18-24.

regularly engaged in the practice of law in another state. While the police power is generally considered an exclusive power of the legislature, it may, for reasons not necessary to detail here, be exercised by the courts (*Workmen's Compensation Board* v. *Abbott*, 212 Ky. 123, 278 S.W. 533, 47 A.L.R. 789; *Petition of Florida State Bas Ass'n*, 40 So.2d 902).

"It is within the permissible function of the state through the supreme court to classify members of the Bar when a real, logical and substantial basis exists for the classification. The equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority. That clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned (*Louisville & Nashville R. R.* v. *Melton*, 218 U.S. 36, 54 L. Ed. 921, 30 S. Ct. 676). * * *

"The same is true of the due process clause. The enjoyment of property is subject to the exercise by the state of the police power, and the question whether what has been done amounts to a taking of property is whether such taking was pursuant to a valid exercise of that power (12 Am. Jur., Constitutional Law, Par. 652, p. 344), or, as in the instant case, the valid exercise of inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, which is the equivalent of the police power. Regulations are not unconstitutional merely because they operate as a restraint upon private rights of persons or property, or will result in a loss to individuals. * * * (Appendix A, pp. 15-17).

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"* * * This opinion is concluded with the observation there is no substantial and fair ground to say that the rules in question make an unreasonable and unfounded classification thereby denying to the appellant due process of law or the equal protection of the law." (Appendix A, p. 20).

## THE QUESTION IS SUBSTANTIAL.

The question involved has not been passed upon by the United States Supreme Court or by any other American court. In its narrow aspect it relates to the arbitrary exclusion of an attorney from the full right to practice, but in its broader implications touches upon the freedom of the legal profession from unreasonable restrictions—a freedom which this Court proclaimed in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, in dealing with those seeking admission to the profession. The implementation of this freedom to those already admitted is imperative. The legal profession must not be left to the caprice of state action.

### I. Due Process.

### A. Appellant is Deprived of Substantial Interests.

Appellant Keith Martin was admitted to practice in Kansas in 1948 by an order of the Supreme Court of Kansas. This order is for life or until disbarment for cause. *Hanson* v. *Grattan*, 84 Kan. 843, 115 Pac. 646 (1911). No condition was attached to his Kansas license that he must not practice in another state, *Dyche* v. *Crawford*, 183 Kan. 141, 327 P.2d 1047 (July, 1958),[5] and he practiced in Kansas

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5. This case held that a resident lawyer who had been admitted to the Kansas Bar could not be deemed a "foreign attorney" within the meaning of Kan. G.S., 1949, 7-104 (*supra*, pp. 4-5) by reason of his having also been admitted to practice in another state. The court said:

> "It would seem clear that Section 7-104 has no application to lawyers who are admitted to the Bar of the State of Kansas.
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> * * *
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> "Certain additional qualifying words have been added to the statute in ninety years and certain additional safeguards have been added, but it remains clear that the subjects of the section are attorneys at law admitted to practice

and Missouri for ten years. By the amendment of Rules 41 and 54 in late 1958 and the decision below, the Kansas court has deemed that appellant must now be joined by "local counsel." This ruling has in effect suspended Martin's Kansas license. Henceforth he is to be treated as a "foreign lawyer" who is presumed to be incompetent in Kansas law and procedure, and who is allowed to appear in Kansas courts only if his client's interests are "safeguarded" by the presence of "local counsel." Appellant's status before the Kansas courts is therefore the same as a non-resident attorney who has not been admitted to the Kansas Bar. He is thus threatened with the loss of a practice built up through ten years of effort, and with the destruction of one-half of his income. No client will seek or retain him as counsel in a Kansas court any more; he has been declared incompetent to appear unless bolstered by local counsel. And even if a client should exist who does not object to a blemished attorney, appellant cannot afford to engage in a practice from which someone else is entitled to a large portion of the emoluments for the sole reason of his compulsory presence.

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in other States but not admitted to practice in Kansas." 183 Kan. at 443-444, 327 P.2d at 1049.

At the time of the *Dyche* case, Rule 41 did not have the final proviso that the present Rule does (*supra*, pp. 5-6), and Rule 54 was applicable exclusively to "An attorney *residing* outside of this state" rather than—as it is now—"An attorney regularly *practicing* outside of this state" (*supra*, p. 6).

After the *Dyche* decision, the Rules were amended to their present form. The Kansas Supreme Court admits in its opinion below that the "practical effect [of the amended Rules] was to extend the statute's coverage to include those members of the Kansas Bar who regularly engage in the practice of law in another state." (Appendix A, p. 12).

**B. The Kansas Court's Rules Are Subject to Due Process.**

The power of the Supreme Court to formulate rules in the furtherance of the administration of justice is admitted, but such power has a built-in limit consistent with reasonable and rational application. State courts are not less forbidden than legislatures by the Fourteenth Amendment to deprive persons of their substantive rights. *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Shelly* v. *Kramer*, 334 U.S. 1. Because a lawyer is an officer of the court and subject to higher standards of conduct than may be expected of persons in other professions, it does not follow that he has ceased to be a "person" within the meaning of the Fourteenth Amendment or has abdicated his constitutional rights. Whatever formerly may have been thought with respect to the right to practice law, it has now been authoritatively decided by this Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent* v. *West Virginia*, 129 U.S. 114. Cf. *Slochower* v. *Board of Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183. And see *Ex parte Secombe*, 19 How. 9, 13. A State can require high standards of qualifications, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualification must have a rational connection with the applicant's fitness or capacity to practice law*. *Douglas* v. *Noble*, 261 U.S. 165; *Cummings* v. *Missouri*, 4 Wall. 277, 319-320. Cf. *Nebbia* v. *New York*, 291 U.S. 502." 353 U.S. at 238-239. (Emphasis added).

* * *

> "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that *a person cannot be prevented from practicing except for valid reasons.* Certainly the practice of law is not a matter of the State's grace. *Ex parte Garland*, 4 Wall. 333, 379." 353 U.S. at 239, footnote 5 (Emphasis added).

In *Schware* this Court dealt with state denial of admission to practice– ne applicant had been rejected because of failure to establish "good moral character"—here the problem is one of state exclusion from practice after admission. The principles are the same. It is inconceivable that the Fourteenth Amendment is concerned with admission to practice but is indifferent to the fate of the attorney afterward. If unreasonableness and arbitrariness are forbidden at the threshold of a legal career, as in *Schware*, when the burden of proof is on the applicant seeking admission, unreasonableness and arbitrariness are surely forbidden when the state has the burden and seeks to deprive a long-standing member of its Bar of the right fully to engage in practice. Many years ago, when the 1865 Congress sought to exclude Southern adherents from practice before federal courts, this Court said in *Ex parte Garland*, 4 Wall. 333, 379:

> "The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the Legislature. It is a right of

which he can only be deprived by the judgment of the court, for moral or professional delinquency."[6]

*Schware* and *Ex parte Garland* thus establish as to lawyers the principle which is implicit in the Fourteenth Amendment as to all persons, namely, that the state may not act arbitrarily; or, stated positively, that the means selected by the state or its agencies must have rational connection with an end the state is empowered to achieve under its police power. *Weaver* v. *Palmer Brothers Co.*, 270 U.S. 402. It is submitted that amended Rules 41 and 54 lack such necessary reasonable basis as applied to appellant Martin and that the Kansas Supreme Court has failed in sustaining the burden resting upon it of justifying the revocation of appellant's right, and of the right of all others similarly situated, to represent clients in Kansas courts.

**C. The Kansas Court's Rules are Arbitrary and Unreasonable.**

The Kansas Supreme Court seeks to justify amended Rules 41 and 54 in their general application and not in reference to appellant through the medium of extravagant judicial notice of facts—facts which the Court had not previously noted in *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190, when Rules 41 and 54 were under identical attack, and which had not been urged in the proceeding below by the appellee or by the bar associations. Such self-serving declarations are not self-evident truths to be taken at face value; no pronouncement of a rule making body can forestall attack

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6. It is this statement in *Ex parte Garland* to which Mr. Justice Black was no doubt referring when he cited the case in footnote 5 of the *Schware* opinion. See p. 17, *supra*, 353 U.S. at 239.

upon the constitutionality of its enactments by the opprobriousness of the epithets applied to the prohibited act. *United States* v. *Caroline Products Co.*, 304 U.S. 144. What is more significant is that the court meticulously avoids ascribing to appellant any of the faults or inadequacies which are supposed to justify amended Rules 41 and 54. His competency, conscientiousness and integrity are admitted. He is given the apology that "in carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regrettably, that some one of them may work a hardship on some member or group of members of the bar." (Appendix A, p. 15).

**1. The Kansas court is endeavoring to set up interstate economic barriers.**

The Kansas court takes judicial notice that approximately 6/7 of the 2,100 practicing attorneys in the Kansas City metropolitan area are officed on the Missouri side of the state line (Appendix A, p. 13). The court then describes in some detail the great industrial areas in Wyandotte and Johnson County, Kansas, leaving the inference that the main litigation is in those counties and not in Missouri. It seems indeed strange that 1,800 of the 2,100 practicing attorneys should be in Missouri where there is little of this industrial business, leaving Kansas without adequate counsel, especially since under the implications of Rules 41 and 54 these Missouri lawyers are getting the Kansas business and the court feels litigants should hire local Kansas lawyers.

The total lack of relevancy between a lawyer's competency to appear in court and the distribution of lawyers in relation to the quantity of litigation serves to emphasize the fact that the Kansas court is primarily

concerned in its amended Rules with the erection of barriers for the economic protection of Kansas lawyers engaged in one state practice. Yet, the United States is more than a collection of states; it is a unified nation to whose formation this Court has greatly contributed. Freedom of movement and the right of the individual to conduct affairs in several states has been zealously guarded. *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Edwards* v. *California*, 314 U.S. 160. In the latter decision the Court significantly remarked:

> "It is frequently the case that a state might gain a momentary respite from the pressure of events by the simple expedient of shutting gates to the outside world. But in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.' Baldwin v. Seelig, 294 U.S. 511, 523." 314 U.S. at 173.

**2. The Kansas court ignores its own rule for service of process.**

The Kansas Court purports to take judicial notice that Kansas courts have experienced difficulty in getting service of papers and motions on Kansas licensed attorneys officed in Missouri and in securing the presence of Kansas licensed attorneys officed in Missouri (Appendix A, p. 15).[7] It is strange that no allusion was made to any such difficulties in the trial court or in *Taylor* v. *Taylor*, *supra*,

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7. In the metropolitan area of Kansas City, there are approximately twenty attorneys, including Martin, who reside and practice in Kansas but who also practice in Missouri, thus engaging in a substantial bi-state practice.

and stranger yet that the statutory procedure for the service of notice[8] works satisfactorily in respect to Kansas lawyers with home and office located at points in Kansas remote from the Wyandotte and Johnson County courts, but works unsatisfactorily in respect to Kansas lawyers with home and office in Wyandotte or Johnson County who also happen to have an office in Missouri; and that telephone communication is available as to one group of lawyers but not as to another. It is wondrous that Missouri-officed Kansas lawyers as a class are more remiss than their Kansas-officed brethern in appearance in court and that this remissness can be attributed to the few extra minutes driving time by which their Missouri offices are farther from Kansas courthouses than some Kansas offices.[9]

The Court's hypothetical grounds are premised on a confusion of the "foreign attorney" without residency or office in Kansas, falling within G.S. 1949, 7-104[10] and who cannot be readily reached by process, and the Kansas attorney regularly practicing in Kansas with residence and office there who is affected by amended Rules 41 and 54 because he also practices in Missouri. Appellant

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8. G.S. 1949, 60-3824, Rule 44 of the Kansas Supreme Court, governing practice in district courts, provides:

> "Counsel filing a motion or demurrer or pleading subsequent to the petition shall, on the day the same is filed, deliver or mail a copy thereof to counsel of record for all adverse parties."

9. A lawyer in Mission, Prairie Village or Overland Park, Kansas, all in Johnson County, is closer to downtown Kansas City, Missouri, than he is to Olathe, the county seat in Johnson County. Expressways link downtown Kansas City, Missouri, with Olathe and Kansas City, Kansas, the county seat of Wyandotte County. Convenient highways and streets bind all these communities together.

10. See "Statutes Involved", *supra*, pp. 4-5.

Martin has both home and office in Kansas to which process can be mailed or served under the Kansas Court's Rule 44.[11] It is admitted that he has never failed to receive process and that no difficulty has been experienced in securing his presence in court. To require him to employ co-counsel (whose indifference to process is in fact immaterial, it being demanded only that he does not practice regularly in Missouri) is manifestly unnecessary and unreasonable. To be sure appellant may not always be in his Kansas office, but it can hardly be expected of a lawyer that in order to remain in good standing at the bar he confine himself day and night to such office. If amended Rules 41 and 54 can be applied to a resident Kansas attorney because he is absent from the state for periods of time to care for his Missouri practice, then a similar restriction can be applied to any Kansas lawyer who absents himself from the state for any reason whatever. Viewed from this logical extreme it may become risky for a Kansas lawyer to do otherwise than confine himself to perpetual seclusion in Kansas. The mere possibility that some day Martin might be unavailable is no justification for barring him from the Kansas courts unless he appears with local counsel. *Adams* v. *Tanner*, 244 U.S. 590.

**3. The Kansas court erroneously believes that specialization follows state lines and not subject matter.**

The Kansas court further seeks to justify amended Rules 41 and 54 upon "the consideration that in the past decade or so the manner in which law is practiced has tended to swing with emphasis to the specialist." * * * Litigation invokes statutory laws, rules of courts, and peculiarities of local practice requiring special knowledge and opinions. Such matters are best handled by a local

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11. See footnote 8, *supra*.

attorney who constantly deals with problems arising in a variety of situations. Trial work requires immediate decisions—there is little time for reflections and research. Only the lawyer with considerable experience in a particular forum can adequately and consistently render high-level service in the area of local procedure." (Appendix A, p. 18).

Kansas does not have a class of barristers whose functions are clearly delineated from those of solicitors. An "office attorney" with no trial experience whatsoever is perfectly free to try any case in any Kansas court. Thus Kansas lawyers may practice before any Kansas court, whether they are familiar with local peculiarities or not, and they are not required to be joined by "local counsel." The Kansas Supreme Court appears to think that specialization depends upon state lines rather than on subject matter; *sub silentio* it assumes that the Kansas-Missouri lawyer who specializes, shall we say, in personal injury litigation knows less about the Kansas Workmen's Compensation Law and practice before the Kansas Workmen's Compensation Commission than does a lawyer practicing exclusively in Kansas who deals solely with tax matters or real estate or probate practice. The absurdity of this assumption destroys the reasonableness of the amended Rules.

The Kansas court tries to give the impression that it is striking at those who have virtually no practice in Kansas, that is "foreign attorneys" under G.S. 7-104. Yet Rules 41 and 54 are not applicable solely to "foreign attorneys" but to Kansas domiciled lawyers regularly practicing in Kansas. The latter have had experience in Kansas trial procedure and most are competent trial lawyers, as appellant admittedly is, and are far abler to represent Kansas clients than an in-

experienced Kansas office lawyer or recent graduate, either of whom will eminently qualify as "local counsel" under Rules 41 and 54. Without the trouble of investigating realities, the Kansas Supreme Court has characterized a certain group of Kansas practitioners as incompetent to appear without assistance, as "non-specialists in Kansas procedure," simply because they also practice "regularly" in Missouri. It is patently ridiculous to say that if a man devotes some time to learning Missouri practice and procedure, he is thereby rendered incompetent in Kansas procedure. The same would be true regarding federal practice or the procedures before the myriad of administrative agencies not exclusively of Kansas origin or location.

**4. The amended rules are vague and uncertain.**

The Kansas court does not define what it means by "regularly engaged" in out-of-state practice. Apparently the court intends to embody flexibility and latitude in Rules 41 and 54 so that they may be applied whenever a Kansas court feels that a Kansas attorney has exceeded his proper quota of out-of-state practice. A standard so vague *ipso facto* denies due process of law. *Winters* v. *New York*, 333 U.S. 507; *Musser* v. *Utah*, 333 U.S. 95. Economic vagaries and the whims of the courts are to determine whether one Missouri client or fifty makes a Kansas lawyer ignorant of Kansas law and procedure and incompetent to appear in a Kansas court without association of local counsel.

In sum, therefore, the Supreme Court of Kansas has failed to justify the imposition of its "local counsel" rule upon appellant Martin, a qualified member of its Bar who maintains an office, practices and resides in Kansas. Preventing appellant from engaging in Missouri practice certainly has no demonstrable relation to the better ad-

ministration of justice in Kansas. And no rational relation exists between amended Rules 41 and 54 and the qualifications which Kansas imposed upon appellant at the time of his admission to the Bar. *Schware* v. *Board of Bar Examiners, supra; Ex Parte Garland, supra.* Whatever may be the power of the Kansas court to attach a condition to the license of an attorney admitted after December 15, 1956, when the Rules were amended, the court cannot by its mere whim deprive a previously admitted, long-standing and qualified attorney of the fruit of years of preparation and practice.[12] As amended and applied by the Supreme Court of Kansas, Rules 41 and 54 are unreasonable and arbitrary, and deprive appellant of due process of law.

**II. Equal Protection.**

Amended Rules 41 and 54 deprive appellant of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause voids specious or fanciful classifications which cause some persons to be treated differently than others when they are actually similarly situated; the classification must bear a substantial relation to a legitimate objective of the State. *Morey* v. *Doud*, 354 U.S. 457; *Skinner* v. *State of Oklahoma*, 316 U.S. 535; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389. As stated by the Court in *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527:

> "The State must proceed upon a rational basis and may not resort to a classification that is palpably

12. Cf. this Court's statement in *Konigsberg* v. *State Bar of California*, 353 U.S. at 257-258: "The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer." *A fortiori* the action of the Kansas court has "grave consequences" for a man in Martin's position.

> arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Louisville Gas & E. Co. v. Coleman*, 277 U.S. 32, 37; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160."

The classification resulting from Rules 41 and 54 of the Kansas Supreme Court lacks any "rational basis" and is "palpably arbitrary." Appellant Martin and other Kansas attorneys similarly engaged in out-of-state practice are placed by the imposition upon them of Rules 41 and 54 into the category of "foreign attorneys" with all the disabilities attaching thereto. While they may practice outside the State, they do not differ as to legal knowledge, availability, capacity or moral qualities from Kansas attorneys with practices limited to Kansas who are not subjected to the onerous restrictions of Rules 41 and 54. A licensed Kansas attorney who also practices in another state demonstrates no absence of qualities necessary for the practice of law in Kansas and offends against no constitutionally valid policy of Kansas; this has been shown above in respect to the matter of denial of due process. By parity of reason, the fact that a Kansas attorney also practices outside the state is an insubstantial, speculative and remote basis of discrimination, and a classification resting thereon does not "rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Allied Stores of Ohio* v. *Bowers, supra*. The Fourteenth Amendment guarantees not only equal protection of the laws but also the protection of equal laws. *Yick Wo.* v. *Hopkins*, 118 U.S. 356, 369; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 350.

## CONCLUSION.

For the reasons stated, this Court has jurisdiction, the question presented is substantial, and probable jurisdiction should be noted.

Respectfully submitted,

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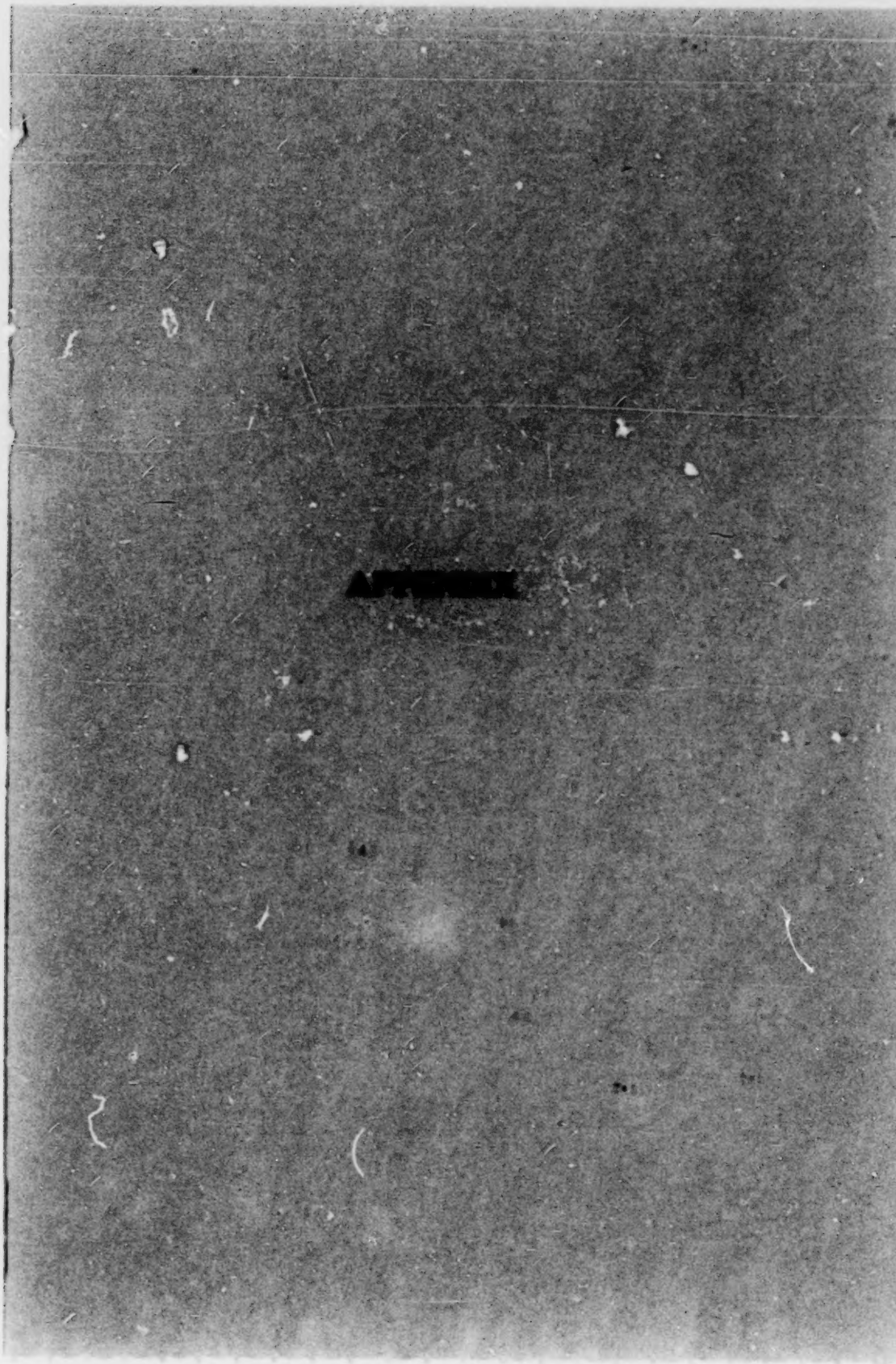
January 6, 1960.



## APPENDIX A.

KEITH MARTIN, *Appellant*,

v.

JOSEPH S. DAVIS AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS, *Appellee*.

**Syllabus by the Court.**

1.

Under Article 3, Section 1 of the Constitution of Kansas the supreme court stands at the head of the judicial department and is invested with inherent power arising from its creation, or from the fact that it is a court, which power is essential to its being and dignity, and does not require an express grant to confer it.

2.

Inherent power is not an arbitrary and despotic power to be exercised at the pleasure of the court, or because of passion, prejudice, or personal hostility; rather, it is one to be used with moderation and caution in the exercise of sound judicial discretion.

3.

The practice of the law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government.

4.

Under Article 3, Section 1 of the Constitution of Kansas, the supreme court has the inherent power to prescribe conditions for admission to the Bar, to define,

supervise, regulate and control the practice of law, whether in or out of court, and statutory regulations are effective and directory only when they accord with the inherent power of the judiciary.

5.

The supreme court's legitimate concern for maintaining high standards for the practice of the law and the administration of justice extends beyond the initial licensing of attorneys and, when admitted to the Bar, they are amenable to the rules and discipline of the court in all matters of order and procedure and to the continuing supervision and control of the practice of the law not in conflict with the federal and state constitutions.

6.

No final judgment results when the supreme court admits an applicant to the Bar of the state of Kansas; a license or privilege is merely conferred upon the applicant to engage in the practice of law subject to the conditions prescribed in paragraph 5 of the syllabus.

7.

While the police power is generally considered an exclusive power of the legislature, it may be exercised by courts.

8.

Rules 41 and 54 of the supreme court, amended December 15, 1958, providing in substance that an attorney admitted to the Bar of Kansas who has been admitted to the Bar of another state and who is regularly engaged in the practice of law in that state shall associate local counsel before he can appear in the courts or before boards or commissions of Kansas, were adopted to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a

Kansas licensed attorney who is regularly engaged in the practice of law in another state.

9.

Rules referred to in paragraph 8 of the syllabus are examined, and it is *held*: The rules are a proper and valid exercise of the inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, and, as applied to the appellant, they do not deny him due process of the law or the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, as more fully set forth in the opinion.

Appeal from Johnson district court, division No. 1; EARL E. O'CONNOR, judge. Opinion filed December 10, 1960. Affirmed.

*Keith Martin*, of Kansas City, Missouri, and Mission, Kansas, argued the cause *pro se*, and *Howard E. Payne*, *W. C. Jones* and *H. Thomas Payne*, of Olathe, were with him on the briefs for appellant.

*John J. Gardner*, County Attorney, of Olathe, argued the cause and was on the briefs for appellee.

*D. B. Lang*, of counsel, Bar Association of Kansas, of Scott City, *James E. Fussell*, of counsel, Leavenworth County Bar Association, of Leavenworth, and *Willard L. Phillips*, *James K. Cubbison*, *Lee E. Weeks*, *Edward M. Boddington, Sr.*, *Charles F. Williams*, *Joseph T. Carey* and *Bernard W. Alden*, all of Kansas City, were on the briefs of the Wyandotte County Bar Association as *amicus curiae*.

*George A. Lowe*, *Eugene T. Hackler*, *Roy S. Lowe*, *Hugh H. Kreamer* and *James H. Bradley*, of Olathe, and *Bernis G. Terry*, of Mission, were on the briefs of the Johnson County Bar Association as *amicus curiae*.

The opinion of the court was delivered by

FATZER, J.: At issue is the power of the supreme court of Kansas to control and supervise the practice of law before the courts of the state by Kansas licensed attorneys regularly engaged in the practice of law in another state.

The action was one in mandamus to compel the appellee, the probate judge of Johnson County, Kansas, to permit the plaintiff, Keith Martin, to file cases in that court and to appear and try them without the appearance or association of local counsel as required by Rules 41 and 54 of this court, amended December 15, 1958, and to declare those rules unconstitutional and void as contravening the Fourteenth Amendment to the Constitution of the United States. The district court quashed the alternative writ and the plaintiff appealed. The principal question presented was before this court in *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190, certiorari denied [*sic*, appeal dismissed] 361 U.S. 374, 4 L. Ed. 2d 380, 80 S. Ct. 401, and was decided adversely to the appellant.

In the interest of brevity Rules 41 and 54, and G.S. 1949, 7-104 therein referred to, are not set forth since the portions here pertinent were quoted at length in *Taylor* v. *Taylor*, supra, pp. 326 and 327, and are incorporated in this opinion by reference. Suffice it to say those rules, as amended, provide in substance that an attorney admitted to the bar of Kansas who has been admitted to the Bar of another state and who is regularly engaged in the practice of law in that state shall associate local counsel before he can appear in the courts or before boards or commissions of Kansas. While rules of the supreme court form no part of the statutory law of the state, the revisor of statutes publishes them in the general statutes, and the

reader may find Rule 41 as G.S., 1959 Supp., 7-122, and Rule 54 as G.S., 1959 Supp., 60-3827.

The petition alleged that the appellant was graduated from the University of Kansas Law School in 1947 and almost immediately thereafter, in August, 1947, was duly licensed to practice law in the state of Missouri, and since that time has regularly practiced law and maintained his office in the Bryant Building, Kansas City, Jackson County, Missouri. On February 12, 1948, he was admitted to practice law before the supreme court of Kansas and all inferior courts, and since April, 1948, has continuously maintained an office and his residence in Mission, Johnson County, Kansas.

The appellant alleged he is engaged in the general practice of law and that his clients frequently live in one county and either work or have business connections in another county and state and that their problems involve the laws and procedures of Kansas and Missouri, and that his knowledge of the laws and procedures and his ability to practice in either state have been of assistance to him in obtaining clients and in being able to give them counsel and court representation; that he consults with as many clients in his Kansas office or home as in his Missouri office although most of his office work is performed in his Missouri office; that he has represented the State Highway Commission in litigation in Kansas courts and has tried as many litigated matters in the courts of Kansas as in Missouri; that he has also tried cases in the federal courts of each state and has argued cases in the appellate courts of each state as well as the United States Circuit Court of Appeals for the Eighth and Tenth Circuits; that since 1951 he has been attorney for the city of Mission and is presently a member of the State Board of Tax Appeals

of Kansas; that he wrote an article on Kansas Procedure published in 6 Kansas Law Review, p. 134, and that he has been and is a member of the state and local Bar associations of Kansas and Missouri.

Martin alleged that his net income from the practice of law exceeded $15,000 per year and that approximately one half of that sum has been earned in Kansas and has been so reported on his Kansas state income tax returns, that a large portion of his income is derived from his appearances in the defendant's court which has jurisdiction of adoptions and decedents' estates; that the minimum fee schedules of the Johnson and Wyandotte County Bar Associations require that local counsel be compensated approximately one-third to one-half of the fee for the particular litigation; that prior to the amending of Rules 41 and 54 and the decision in the Taylor case, *supra*, he regularly appeared for clients without the appearance and association of local counsel but that subsequent thereto the defendant has not allowed him to appear and try cases in the probate court of Johnson County unless he has local counsel associated with him, and the defendant has informed him that in the future he cannot appear as attorney for clients without the appearance and association of local counsel as required by Rules 41 and 54.

Martin alleged that Rules 41 and 54 are vague, arbitrary and without standards and have caused his Kansas license to be in fact a nullity as long as he practices law "regularly" in Missouri; that those rules not only deprive him of part of his income from his Kansas practice but also discourage clients from seeking his services; that because he cannot represent them in Kansas courts without the appearance of another lawyer, they have come to believe he cannot counsel them regarding Kansas law or represent them in Kansas courts; that the amended rules place him

in the category of a foreign attorney as referred to in G.S. 1949, 7-104, and render his Kansas license inoperative so long as he "regularly" practices in Missouri unless he has another Kansas lawyer associated and appearing with him; that he has continuously listed and maintained telephones in his offices in Kansas and Missouri and his residence, and that since 1948 Kansas lawyers have obtained service of pleadings upon him by mailing them to his Kansas office or residence or have left them at either place.

Martin alleged that the amended rules deny him due process and equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States and that unless the defendant allows him to appear in the probate court of Johnson County in all cases now pending and all future cases without the appearance and association of local counsel he will lose clients and a substantial part of his income and will be deprived of the right to practice his profession in the defendant's court. Further, that his Kansas license granted him the right to appear in the supreme court and in all inferior courts including the court presided over by the defendant.

Martin further alleged that he had no adequate remedy at law; that as a matter of right he was entitled to file cases in the defendant's court and try them without appearance and association of local counsel; that he has suffered and will suffer irreparable injury if the defendant is not compelled to permit him to file and try lawsuits without appearance and association of local counsel. The prayer was that the relief sought be granted and that amended Rules 41 and 54 and G.S. 1949, 7-104 be declared unconstitutional and void.

The defendant, appearing by the county attorney of Johnson County, filed a motion to quash the alternative writ upon the ground that neither the writ nor the petition alleged facts showing that Martin was entitled to the relief sought.

Prior to hearing the matter, the Johnson County Bar Association filed an application to intervene as *amicus curiae* upon the ground that the questions raised were of interest and concern to that association and it was granted leave to file such pleadings as it deemed proper. The committee on Unauthorized Practice of the Law of the Wyandotte County Bar Association made no application to enter the case as *amicus curiae*, but did appear and offered assistance to the county attorney in the trial of the matter.

The district court sustained the defendant's motion to quash the alternative writ, and Martin duly perfected this appeal.

Before discussing the legal questions here presented it should be noted that during the pendency of this appeal the committee on Unauthorized Practice of the Law of the Wyandotte County Bar Association made application and was granted leave to file its brief as *amicus curiae* in support of the district court's judgment. The Leavenworth County Bar Association and the Bar Association of the State of Kansas joined in that brief. Likewise, the committee on Unauthorized Practice of the Law of the Johnson County Bar Association asked for and was granted leave to file its brief as *amicus curiae* for the same purpose.

When this case was heard on the merits, the appellant argued that this court does not have power to adopt rules relating to the admission of applicants to the Bar, or to regulate and control the practice of law by attorneys

previously admitted, hence, Rules 41 and 54 are ineffective and meaningless. The contention is without merit. The constitution of Kansas distinctly distributes the powers of the government to the executive, legislative and judicial departments. Under Article 3, Section 1 the judicial power is vested in a supreme court, district courts, probate courts, justice of the peace, and such other courts, inferior to the supreme court, as may be provided by law. Under that provision of the constitution, the supreme court stands at the head of the judicial department (*Householder* v. *Morrill*, 55 Kan. 317, 40 P. 664) and is invested with inherent power arising from its creation, or from the fact that it is a court. Inherent power is essential to its being and dignity, and does not require an express grant to confer it (*Petition of Florida State Bar Ass'n*, 40 So.2d 902). It is not an arbitrary and despotic power to be exercised at the pleasure of the court, or because of passion, prejudice or personal hostility; rather, it is one to be used with moderation and caution in the exercise of sound judicial discretion (7 C.J.S., Attorney and Client, Par. 13, p. 729).

It is unnecessary here to explore the limits of judicial power conferred by that provision, but suffice it to say the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government (*In re Integration of Nebraska State Bar Ass'n*, 133 Nebr. 283, 275 N.W. 265, 114 A.L.R. 151). Included in that power is the supreme court's inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise

of its police power to protect the public interest and welfare (*The People* v. *Goodman*, 366 Ill. 346, 8 N.E.2d 941, 111 A.L.R. 1; *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604, 151 A.L.R. 586; 5 Am. Jur., Attorneys at Law, Par. 2). It follows that the power of the supreme court to make reasonable rules for those purposes is not open to question (*Peyton's Appeal*, 12 Kan. 398; *Farlin* v. *Sook*, 30 Kan. 401, 1 P. 123; *In re Smith*, 73 Kan. 743, 85 P. 584; *In re Wilson*, 79 Kan. 450, 100 P. 75; *In re Gorsuch*, 113 Kan. 380, 214 P. 794; *In re Hanson*, 134 Kan. 165, 5 P.2d 1088; *State, ex rel.*, v. *Perkins*, 138 Kan. 899, 28 P.2d 765; *Depew* v. *Wichita Association of Credit Men*, 142 Kan. 403, 49 P.2d 1041; *State, ex rel.*, v. *Schmitt*, 174 Kan. 581, 258 P.2d 228; *Taylor* v. *Taylor*, *supra*).

The appellant next contends that when he was admitted to the Bar of this court in 1948 Rules 41 and 54 did not require him to associate local counsel as a condition to his appearance in courts of the state, and argues that the amendments in December 1958 operate to suspend his right to practice law in Kansas because he regularly practices in another state. He further contends that the court's order admitting him to practice was a final judgment and conditions not a part of that judgment cannot be subsequently imposed. The contentions lack substance. Attorneys at law are a specially qualified class of persons for the purpose of assisting the state and its tribunals to administer justice. While they do not hold an office or public trust in a constitutional or statutory sense, they are, because of their close intimate relationship to the courts, an important part of the judicial system of the state and are "officers of the court" (*In re Gorsuch*, supra; *In re Hanson*, supra; *State, ex rel.* v. *Perkins*, supra; *Depew* v. *Wichita Association of Credit Men*, supra). Although G.S. 1949, 7-102 provides who may be admitted

to practice in all the courts of the state upon taking the oath prescribed, the statutory regulation is effective and directory only when it accords with the inherent power of the judiciary because the licensees are officers of the court (*Depew* v. *Wichita Association of Credit Men*, supra, p. 406).

The supreme court's legitimate concern for maintaining high standards for the practice of the law and the administration of justice extends beyond the initial licensing of attorneys. Without the power of supervision and control, the initial examination would afford little, if any, opportunity to determine the continuing qualifications of attorneys practicing before it and the inferior courts of the state, or when the privilege of practicing law has been forfeited. When admitted to the Bar, attorneys at law become amenable to the rules and discipline of the court in all matters of order and procedure and to the supervision and control of the practice of law not in conflict with the constitution. Since the rules in question operate uniformly upon all members of the Bar from the time of their adoption, the appellant, like all other attorneys who become subject to their provisions, was bound to comply with them in his practice of the law in this state. Moreover, no final judgment resulted when he was admitted to the Bar—a license or privilege was merely conferred upon him to engage in the practice of law (*In re Casebier*, 129 Kan. 853, 855, 284 P. 611; *In re Hanson*, supra) for the term of his life or until disbarred by a court of competent jurisdiction (*Hanson* v. *Grattan*, 84 Kan. 843, 115 P. 646). The practice of the law has been defined in *State, ex rel.* v. *Perkins*, supra, and *Depew* v. *Wichita Association of Credit Men*, supra, p. 408, and both cases recognize that it does not only include appearances in court on litigated matters, but covers

services rendered to a client in advising him of his rights. See, also, *State ex rel.* v. *Schmitt*, supra, p. 588. Hence the appellant, although he regularly practices law in Missouri, is not prohibited from practicing law in Kansas by counseling and advising his clients, or preparing documents requiring knowledge of legal principles not possessed by a layman, or of advising the city officials, as city attorney. Neither is he prohibited from practicing before the courts and tribunals of this state whenever he wishes—he has only to comply with the condition imposed of associating with local counsel. In *Taylor* v. *Taylor*, supra, it was said:

> "* * * Martin's license to practice law before the courts of the state of Kansas has not been in dispute nor has he been disbarred * * *." (l.c. 328.)

Clearly, Rules 41 and 54 do not revoke or suspend the appellant's license or right to practice law in this state, nor did they change the provisions of the statutory law (G.S. 1949, 7-104); their practical effect was to extend the statute's coverage to include those members of the Kansas Bar who regularly engage in the practice of law in another state.

We now turn to the principal question, whether Rules 41 and 54 violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The appellant contends that, as applied to him, they lack a rational connection between the grounds for "suspension" of his license and qualifications *essential* to the practice of law, and, between the "suspension" of his license and *any* objective the court might legitimately attain in the exercise of its power to maintain the standards of the Bar, and relies upon *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 1 L.Ed. 2d

796, 77 S.Ct. 752; *Knoigsberg* [*sic*] v. *State Bar*, 353 U.S. 252, 1 L.Ed. 2d 810, 77 S.Ct. 722 and *In re Patterson*, 353 U.S. 952, 1 L.Ed. 2d 906, 77 S.Ct. 869. We are cognizant of what was said and held in those cases, but they do not control the question presented.

When this court adopted the amendments to Rules 41 and 54 it was aware of and took judicial notice of the following: Wyandotte and Johnson Counties in Kansas lie along the state line opposite Jackson County, Missouri, and contain a combined area aproximately equal to that of Jackson County. Wyandotte County ranks second in population in Kansas and Johnson County ranks fourth. Those three counties, Jackson, Wyandotte and Johnson, make up the greater part of one metropolitan area which has a population of about one million. The largest of the downtown areas of the Kansas Cities is in Missouri where approximately 2100 practicing attorneys maintain their offices. Of that number, an estimated 300 are Kansas licensed attorneys who reside in Kansas but who regularly practice in Missouri. Some of them, however, maintain an individual part-time practice in Johnson and Wyandotte Counties, are listed in the telephone directory, and, like the appellant, have their names on office doors of, and share office space with, accountants, architects, dentists and real estate brokers. There are approximately 200 active resident practicing attorneys maintaining offices in Wyandotte County and approximately 90 active resident practicing attorneys maintaining offices in Johnson County. Thus, the largest number of practicing attorneys—seven to one—are officed on the Missouri side.

On the Kansas side, in the diked bottom land lying along the Kansas and Missouri Rivers, are located the large industrial areas which include all of the large packing plants, stockyards, a Fiberglass industry, an oil refinery, a

motor assembly plant, and many other hazardous industries. Accordingly, a greater number of accidents in the workmen's compensation and personal injury field occur in Kansas. Litigation arising from those accidents is controlled by Kansas law and falls within the jurisdiction of the Kansas courts.

In the workmen's compensation field alone the volume of business conducted by the courts and commissions in Wyandotte and Johnson Counties runs on a weekly average of 80 to 100 cases, with approximately 40 to 50 percent represented by Kansas City, Missouri, atorneys having local Kansas counsel associated with them. In addition to workmen's compensation cases, Wyandotte County, with four divisions of its district court at Kansas City, Kansas, had an average case load of 2500 to 2600 civil and 350 to 400 criminal cases per year. Its city court, with two divisions, had a case load of approximately 3900 civil cases and from 900 to 950 preliminary hearings in criminal cases per year, including misdemeanors. Its probate court had an extremely heavy docket of proceedings relating to decedents' estates as well as many guardianship cases, and it also had an extensive case load in its juvenile division. The Johnson County District Court, with four divisions at Olathe, had an average case load of approximately 900 to 1000 civil and approximately 100 criminal cases per year. Like Wyandotte County, its probate court had an extensive case load of decedents' estates as well as guardianship proceedings and other matters, and its magistrate court handled in excess of 1000 cases per year.

In the main, that litigation was handled by attorneys falling within four distinct categories: resident Missouri attorneys who associated local Kansas counsel as required by G.S. 1949, 7-104; resident Kansas attorneys maintain-

ing offices in Wyandotte and Johnson Counties; resident Kansas attorneys regularly practicing in Missouri who associated local Kansas counsel, and resident Kansas attorneys who maintained a part-time practice in Kansas but who regularly practiced law and maintained their principal offices in Missouri.

From the totality of the foregoing, Kansas courts and commissions encountered difficulty in procuring the presence of the Kansas licensed attorneys officed in Missouri at the call of the court's and the commission's dockets; in the inability of Kansas officed attorneys to procure service on Missouri officed Kansas attorneys without having to proceed to another state; in the failure of some Kansas licensed attorneys officed in Missouri to answer calls to appear on matters of urgency, and in the failure of those attorneys to familiarize themselves with the rules of local practice and procedure by reason of their infrequent appearance before the courts and tribunals. Altogether too frequently, the courts were faced with the necessity of deciding a case on some technicality caused by the violation of rules established for the practice before the Kansas courts and commissions and because of conflicting statutory provisions between the states of Kansas and Missouri with respect to different periods of general statute limitations (Missouri Revised Statutes 516.110, Par. 1, *et seq*; G.S. 1949, 60-306) and limitations relating to master and servant (see, generally, Missouri Revised Statutes, 287.430; G.S. 1959 Supp., 44-520a).

In carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regrettably, that some one of them may work a hardship on some member or group of members of the Bar. The appellant alleges such a hardship, but, as we have seen, the rules in question were

directed to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a Kansas licensed attorney who is regularly engaged in the practice of law in another state. While the police power is generally considered an exclusive power of the legislature, it may, for reasons not necessary to detail here, be exercised by the courts (*Workmen's Compensation Board* v. *Abbott*, 212 Ky. 123, 278 S.W. 533, 47 A.L.R. 789; *Petition of Florida State Bar Ass'n*, 40 So. 2d 902).

It is within the permissible function of the state through the supreme court to classify members of the Bar when a real, logical and substantial basis exists for the classification. The equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority. That clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned (*Louisville & Nashville R.R.* v. *Melton*, 218 U.S. 36, 54 L.Ed. 921, 30 S.Ct. 676). There is no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 294, 42 L.Ed. 1037, 18 S.Ct. 594). A state has a wide range of discretion in distinguishing; selecting and classifying, and it has been held that it was sufficient to satisfy the demand of the Constitution of the United States if a classification was practical and not palpably arbitrary (*Orient Insurance Company* v. *Daggs*, 172 U.S. 557, 43 L.Ed. 552, 19 S.Ct. 281).

The same is true of the due process clause. The enjoyment of property is subject to the exercise by the state

of the police power, and the question whether what has been done amounts to a taking of property is whether such taking was pursuant to a valid exercise of that power (12 Am.Jur., Constitutional Law, Par. 652, p. 344), or, as in the instant case, the valid exercise of inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, which is the equivalent of the police power. Regulations are not unconstitutional merely because they operate as a restraint upon private rights of persons or property, or will result in a loss to individuals. The infliction of such loss is not a deprivation of property without due process of law—the exertion of the police power upon objects lying within its scope in a proper and lawful manner is due process of law. Hence, the police power may be exerted as a restraint upon private rights of persons or to regulate the use of property, and where appropriate or necessary, prohibit the use of property for certain purposes in aid of the public safety and general walfare, and constitutional limitations form no impediment to its exercise where the regulation is reasonable and bears a fair relationship to the object sought to be attained (*Schaake* v. *Dolley*, 85 Kan. 598, 118 P. 80, 27 L.R.A. (NS) 877; *Dey* v. *Knights & Ladies of Security*, 113 Kan. 86, 213 P. 1066; *McNaughton* v. *Johnson*, 242 U.S. 344, 61 L.Ed. 352, 37 S.Ct. 178; *State* v. *Mugler*, 29 Kan. 252, 123 U.S. 623, 31 L.Ed. 205, 8 S.Ct. 273; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.Ed. 369, 31 S.Ct. 337; *Armour & Co.* v. *North Dakota*, 240 U.S. 510, 60 L.Ed. 771, 36 S. Ct. 440).

When those general principles are applied to the appellant's argument that the classification made is arbitrary, without standard and unreasonable, we think they are decisive against the contention. The classification encompasses members of the Kansas Bar regularly en-

gaged in the practice of law in another state, and is a natural one. The difference between that group of attorneys, who are required to associate local counsel, and resident members of the Kansas Bar, who are not so required, rests upon a consideration which is real as distinguished from one which is fanciful, and has a direct and substantial relation to the object to be attained--the removal of obstacles to a greater public welfare, that is, delays in the orderly administration of justice by Kansas courts and commissions, and, also, to provide litigants in those tribunals with the service of a resident attorney familiar with local rules, procedure and practice and upon whom service may be had in all matters connected with actions or proceedings proper to be served upon an attorney of record.

We think the classification is further justified upon the consideration that in the past decade or so the manner in which law is practiced has tended to swing with emphasis to the specialist. There has developed much new and complex law which has had and will continue to have a profound effect upon the general practice of the law. Those complexities have led to Trial Lawyers versus Office Lawyers; the development of law firms by congregation of specialists; the use of lawyers in trust and title companies, and strong corporate legal departments. Litigation invokes statutory laws, rules of courts, and peculiarities of local practice requiring special knowledge and opinions. Such matters are best handled by a local attorney who constantly deals with problems arising in a variety of situations. Trial work requires immediate decisions—there is little time for reflections and research. Only the lawyer with considerable experience in a particular forum can adequately and consistently render high-level service in the area of local procedure. It is highly desirable that

the legal profession recognize those developments, understand them, and adjust as needed so the public will be adequately protected and the profession strengthened and not weakened.

While the appellant alleges a loss of income as a result of the rules and also that they have discouraged clients from seeking his services because they have come to believe he cannot counsel them or represent them in Kansas courts, nonetheless his regular practice of the law in Missouri has placed him within the classification provided and he is in the group by his own selection and volition. He has not been singled out or made an example of (*Taylor* v. *Taylor*, supra, p. 328), nor has he been discriminated against. He is not the only Kansas licensed attorney affected—any member of the Kansas Bar who, like the appellant, regularly engages in the practice of law in another state is bound to comply with the rules. Neither does the fact that his home is in Kansas where he keeps the Kansas reports; that he shares office space with an accountant where he keeps the general statutes of Kansas; that he has attained high scholastic achievements; that he is the author of an article on Kansas procedure, and is a respected member of the Local and State Bar Associations lessen the binding effect of the rules as applied to him. Looking at all the circumstances that attend, we cannot say that the object sought to be accomplished by the rules presents a clear, unmistakable infringement of the appellant's rights secured by the fundamental law (*Murphy* v. *California*, 225 U.S. 623, 56 L. Ed. 1229, 32 S. Ct. 697, 41 L.R.A. (NS) 153).

During the pendency of this appeal the appellant made application to file the same brief as he filed as counsel for the appellant in the Taylor case, *supra*, which was allowed. The same point of law presented in that appeal

is presented and reargued here, the only difference being that in the instant appeal the appellant was the plaintiff below. It was held in the Taylor case that he was not denied due process of law or the equal protection of the law, and we reaffirm that holding. This opinion is concluded with the observation there is no substantial and fair ground to say that the rules in question make an unreasonable and unfounded classification thereby denying to the appellant due process of law or the equal protection of the law.

The judgment is affirmed.

## APPENDIX B.

### Journal Entry.

On this fourth day of March, 1960, the motion of the defendant to quash the alternative writ of mandamus comes on regularly for hearing. The parties appear in person and by their attorneys of record. Roy S. Lowe appears for the Committee on Unauthorized Practice of the Johnson County Bar Association as *amicus curiae*. Bernhard W. Alden is present for the Wyandotte County Bar Association.

Thereupon, arguments are heard by counsel of record and the court, after having duly considered the same, finds that the motion to quash should be sustained.

It Is, Therefore, Ordered that defendant's motion to quash the alternative writ of mandamus be and the same is hereby sustained and the plaintiff's petition and alternative writ is dismissed and the costs are assessed against plaintiff.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

## No. 30.

KEITH MARTIN,
*Appellant,*

vs.

HERBERT WALTON AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS,
*Appellee.*

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

## BRIEF OF APPELLANT.

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IN THE

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HERBERT WALTON AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS,
*Appellee.*

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

## BRIEF OF APPELLANT.

### OPINION BELOW.

The opinion of the Supreme Court of Kansas (R. 17) is reported at 187 Kan. 473, 357 P.2d 782. The order of the Kansas district court dismissing the appellant's alternative writ of mandamus (R. 13) is unreported.

## JURISDICTION.

The judgment of the court below was entered on December 10, 1960 (R. 19). Notice of appeal to the Supreme Court of the United States was filed with the Kansas Supreme Court on December 31, 1960 (R. 33). Probable jurisdiction was noted on March 27, 1961 (R. 34). The motion to substitute Herbert Walton in the place of Joseph S. Davis as the party appellee was sustained by this Court on May 8, 1961 (R. 35).

The jurisdiction of this Court rests on 28 U.S.C. 1257 (2). There was drawn in question the validity of Kan. G.S. 1949, 7-104 and amended Rules 41 and 54 of the Supreme Court of Kansas on the ground of their being repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. The decision of the Supreme Court of Kansas was in favor of their validity. For the purpose of conferring appellate jurisdiction on the Supreme Court of the United States, amended Rules 41 and 54 are to be treated as statutory within the meaning of 28 U.S.C. 1257 (2). *Hamilton* v. *Regents*, 293 U.S. 245; *Lathrop* v. *Donohue*, ___ U.S. ___,

## QUESTION PRESENTED.

Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States, may an attorney who has been regularly admitted to practice law in the state of his residence and who has maintained an office and active practice in that state since the date of his admission, be denied, by subsequently promulgated court rules, the right to appear as counsel in the courts or before boards and commissions

of that state unless he associates and has appearing with him "local counsel," as if he were a non-resident, unlicensed attorney, for the sole reason that, in addition to his practice and office in the state of his residence, he also maintains an office and practice in an adjoining state?

## STATUTES INVOLVED.

The relevant provisions of the 1949 Kansas General Statutes and the Kansas Supreme Court Rules, as amended December 15, 1958, are as follows:

> Kan. G.S., 1949, 7-104. *Attorneys from other states.* Any regularly admitted practicing attorney in the courts of record of another state or territory, having professional business in the courts or before any board, department, commission or other administrative tribunal or agency, of this state, may, on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon taking the oath as aforesaid and upon it being made to appear by a written showing filed therein, that he has associated and personally appearing with him in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state, upon whom service may be had in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on such foreign attorney, within this state, and such foreign attorney shall thereupon be and become subject to the order of, and amenable to disciplinary action by the courts, agencies or tribunals of this state: *Provided,* That in all actions before a court of record, said associate attorney shall be a resident of and maintain his law office within the judicial district in which said action is filed or pending. No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation

of the provisions of this section: *Provided*, Nothing in this section shall be construed to prohibit any party from appearing before any of said courts, tribunals or agencies, in his own proper person and on his own behalf.

Rule No. 41. *Admission to Practice.* As soon as practicable after the completion of an examination, the board shall file a report with the clerk of the court recommending the granting or the denial of the petition of the applicant. Whenever such report shall recommend the granting of a petition, unless some reason shall appear to the contrary, the court will make an order admitting the applicant to practice in all the courts of the state, which order shall become effective upon his taking an oath in open court, the form of which shall be in substance as follows:

> You do solemnly swear that you will support and bear true allegiance to the constitution of the United States and the constitution of the State of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of any falsehood in court; and that you will discharge your duties as an attorney and counselor of the supreme court and all inferior courts of the state of Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability. So help you God.

Upon the making of such order the clerk shall issue to such applicant a certificate of his authority to practice law in this and all inferior courts of the state, upon his signing his name on the roll of attorneys of this court. Whenever the board shall recommend a denial of the petition, an order will be made to that effect.

> *Provided further however, The authority granted to practice law shall not be exercised except as provided under Rule No. 54 infra, when the licensee herein has been admitted to the Bar of another state or territory and is regularly engaged in the practice of law in such other state or territory.* (Emphasis added.) 186 Kan. xvii

(The foregoing italicized paragraph was added by amendment on December 15, 1958.)

> Rule No. 54. An attorney regularly practicing outside of this state and in good standing as a member of the bar of the place of his regular practice may be recognized as an attorney by the courts, commissions, and agencies of this state, for any action or proceeding, but only if he has associated with him as attorney of record in such action or proceeding a member of the Bar of this state qualified under the provisions of G.S. 1949, 7-104, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record. 186 Kan. xix

(Prior to its amendment on December 15, 1958, Rule 54 referred to an attorney "*residing* outside of this state in good standing as an attorney at the place of his *residence*," rather than the above. (Emphasis added.))

## STATEMENT.

This matter has previously been before this Court in another context, *Taylor* v. *Taylor*, No. 552, 1959 Term, appeal dismissed, 361 U.S. 374. As background for the instant proceeding, the *Taylor* case is briefly reviewed:

On March 10, 1959, a petition for divorce was filed in the Wyandotte County District Court of Kansas by Keith Martin, a member of the Kansas Bar and appellant in the

instant case, as attorney for Margaret Taylor. The defendant in that suit moved to strike the petition on the ground that Martin was a member in good standing of the Missouri Bar and regularly practiced in Missouri, and that he therefore had no authority to file such petition without the association of an attorney of record who was a member of the bar of the State of Kansas as required by amended Rules 41 and 54 of the Kansas Supreme Court. Upon Martin's failure to comply with the trial court's order that he obtain local counsel, Mrs. Taylor's petition was dismissed. Mrs. Taylor appealed to the Kansas Supreme Court contending, *inter alia*, that the application of amended Rules 41 and 54 to her attorney deprived him of due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution. The Kansas Supreme Court sustained the constitutionality of amended Rules 41 and 54 as applied to Martin, and affirmed the order of the trial court. *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190. On further appeal to this Court, the appeal was dismissed. No. 552, 1959 Term, 361 U.S. 374.

Believing that this Court may have dismissed the *Taylor* appeal because of the rule of *Tileston* v. *Ullman*, 318 U.S. 44, or because of possibilities of mootness, Martin returned to the Kansas courts. On February 29, 1960, appellant Martin filed a petition for a writ of mandamus in the Johnson County District Court of Kansas praying that the appellee judge of the Probate Court of Johnson County, Kansas, be compelled to allow appellant to file cases in that court and to appear and try such cases without the appearance or association of local counsel and without regard to amended Rules 41 and 54 of the Supreme Court of Kansas or to Kan. G.S. 1949, 7-104, and in accordance with the license granted to him by the Kansas Su-

preme Court (R. 2-6). The petition further prayed that amended Rules 41 and 54 and G.S. 1949, 7-104, be declared to be in violation of the Fourteenth Amendment of the United States Constitution as applied to appellant. (R. 2, 6.)

Appellant's petition alleged that he had been regularly admitted to practice in the State of Kansas on February 12, 1948, and that from that date to December 15, 1958, he had regularly appeared for clients in the Probate Court of Johnson County, Kansas, without association of "local counsel." Appellant also alleged that subsequent to the promulgation of amended Rules 41 and 54 on December 15, 1958 and the decision of *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190 (1959), discussed above, appellee judge had not allowed appellant to appear in said court without the association of "local counsel," and had informed appellant that in the future he could not appear in defendant's court for clients without the appearance and association of "local counsel." (R. 2, 4.)

After the district court issued an alternative writ directing appellee judge to permit appellant to appear without the association of another Kansas lawyer or to show cause to the contrary (R. 8), appellee filed a motion to quash the writ for the reason that neither the petition nor the writ itself stated a cause of action (R. 9). In its opinion after oral argument, the district court declared that appellant's membership in the Missouri Bar and his regular practice in that state placed him squarely within the purview of amended Rules 41 and 54 requiring joinder of local counsel. The district court found that the facts relative to appellant were substantially the same as in *Taylor* v. *Taylor*, *supra*, and that that decision was determinative of the legal issues involved, including the constitutional questions (R. 11-13). Appellant's alternative writ was therefore dismissed and appellant appealed (R. 13).

According to the undisputed allegations of his petition, appellant was admitted to practice before the Kansas Supreme Court and all inferior courts on February 12, 1948, and is a duly licensed lawyer of the State of Kansas; he resides at 6200 West 61st Street in the City of Mission, Johnson County, Kansas (a community just across the state line from Kansas City, Missouri). Prior to his admission he attended the public schools of Miami County, Kansas, and received his A.B. (1942) and LL.B. (1947) degrees from the University of Kansas, and was elected to Phi Beta Kappa and Order of the Coif. He graduated from the Harvard Business School in September, 1946, with an M.B.A. degree. In 1943-45 he resided in Kansas City, Missouri, and was employed by the Pratt & Whitney Aircraft Corporation and attended night law school at the University of Kansas City. While attending Kansas University Law School in 1945-46 and 1946-47, he taught economics at Kansas University. (R. 2.)

Appellant has engaged in general practice in Kansas since April, 1948, and since that date has continuously maintained an office in Mission, Kansas. He has been City Attorney of Mission, Kansas, since 1951 and is a member of the State Board of Tax Appeals of Kansas. He has represented the State of Kansas in highway litigation in the Kansas courts. He wrote an article on Kansas procedure in the Third Survey of Kansas Law, 6 Kan. L. Rev. 134 (1957). He has argued cases in the Supreme Court of Kansas.[1] He is a member of state and local bar associations of Kansas. (R. 2-3.)

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1. *State* v. *Sharp*, 174 Kan. 672, 258 P.2d 306; *State* v. *Fletcher*, 174 Kan. 530, 256 P.2d 847; *Rhea* v. *Kansas City Power & Light Co.*, 176 Kan. 674, 272 P.2d 741; *Lindbloom* v. *Lindbloom*, 177 Kan. 286, 279 P.2d 243; *State Highway Commission* v. *Abercrombie*, 185 Kan. 47, 340 P.2d 377.

Appellant was duly licensed to practice law in Missouri on August 2, 1947, and has since engaged in general practice in Missouri in addition to his Kansas practice which commenced in April, 1948. He now maintains an office in the Bryant Building, Kansas City, Jackson County, Missouri. He is a member of state and local bar associations of Missouri. (R. 2-3.)

Appellant's petition further alleged that Johnson County, Kansas, and Jackson County, Missouri, in which he maintains his two offices, are contiguous counties; Wyandotte County, Kansas, is contiguous to each of the foregoing counties. The three counties are part of one metropolitan area and have a population of about one million. Appellant's clients frequently live in one county and either work or have business connections in another county and state. Their problems involve the laws and procedures of both states. Appellant's knowledge of the laws and procedures and his ability to practice in either state have been of assistance to him in obtaining clients and in being able to give them counsel and court representation. He consults with as many clients in his Kansas office or home as in his Missouri office, although most of his office work is performed in his Missouri office. (R. 2-3.)

Appellant's net income from his law practice exceeds $15,000 per year. Approximately one-half that sum has been earned from Kansas practice and has been so reported on his state income tax returns. A large proportion of his income is derived from court appearances including adoptions and the probate of estates of which the appellee's court has jurisdiction. Because he cannot represent clients in Kansas courts without the compulsory presence of another lawyer, clients have come to believe that he cannot counsel them regarding Kansas law or represent them in Kansas courts. He is therefore faced

with the loss of a substantial portion of his income. (R. 3-5.)

According to the minimum fee schedules of the Johnson and Wyandotte County bar associations in Kansas, local counsel require compensation of approximately one-third to one-half of the fee for serving as local counsel. Amended Rules 41 and 54 require appellant to share his income with local counsel who frequently are not acquainted with the case in issue but are nevertheless required to be in court by the defendant because of amended Rules 41 and 54. (R. 4.)

**The Decision of the Court Below.**

On appeal to the Supreme Court of Kansas, appellant urged that as applied to him amended Rules 41 and 54 and G.S. 1949, 7-104, were in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. The Kansas Supreme Court rejected appellant's contention. It justified Rules 41 and 54 as applied retroactively to appellant by taking *judicial notice* of the following: that there are six times as many lawyers practicing on the Missouri side as on the Kansas side of the Kansas City metropolitan area but that the bulk of industrial litigation occurs in Kansas courts; that difficulty has been experienced in serving process on, and securing the presence in court of, Missouri-officed Kansas attorneys.[2] The court also found justification in the need for specialization. In regard to the constitutional issues the Kansas Court said:

> "We now turn to the principal question, whether Rules 41 and 54 violate the due process and equal protection clauses of the Fourteenth Amendment to

2. As to the legitimacy of such judicial notice, see discussion *infra*, pp. 26-33.

the Constitution of the United States. The appellant contends that, as applied to him, they lack a rational connection between the grounds for 'suspension' of his license and qualifications *essential* to the practice of law, and, between the 'suspension' of his license and *any* objective the court might legitimately attain in the exercise of its power to maintain the standards of the Bar, and relies upon *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 1 L. Ed. 2d 796, 77 S. Ct. 752; *Knoigsberg* [*sic*] v. *State Bar*, 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 and *In re Patterson*, 353 U.S. 952, 1 L. Ed. 2d 906, 77 S. Ct. 869. We are cognizant of what was said and held in those cases, but they do not control the question presented. (R. 26.)

* * *

"In carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regrettably, that some one of them may work a hardship on some member or group of members of the Bar. The appellant alleges such a hardship, but, as we have seen, the rules in question were directed to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a Kansas licensed attorney who is regularly engaged in the practice of law in another state. While the police power is generally considered an exclusive power of the legislature, it may, for reasons not necessary to detail here, be exercised by the courts (*Workmen's Compensation Board* v. *Abbott*, 212 Ky. 123, 278 S.W. 533, 47 A.L.R. 789; *Petition of Florida State Bar Ass'n*, 40 So.2d 902). (R. 29.)

"It is within the permissible function of the state through the supreme court to classify members of the Bar when a real, logical and substantial basis exists for the classification. The equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority. That clause is not offended against simply because as the result of the exercise

of the power to classify some inequality may be occasioned (*Louisville & Nashville R. R. v. Melton*, 218 U.S. 36, 54 L. Ed. 921, 30 S. Ct. 676). * * * (R. 29).

"The same is true of the due process clause. The enjoyment of property is subject to the exercise by the state of the police power, and the question whether what has been done amounts to a taking of property is whether such taking was pursuant to a valid exercise of that power (12 Am. Jur., Constitutional Law, Par. 652, p. 344), or, as in the instant case, the valid exercise of inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, which is the equivalent of the police power. Regulations are not unconstitutional merely because they operate as a restraint upon private rights of persons or property, or will result in a loss to individuals. * * * (R. 30).

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"* * * This opinion is concluded with the observation there is no substantial and fair ground to say that the rules in question make an unreasonable and unfounded classification thereby denying to the appellant due process of law or the equal protection of the law." (R. 32)

## SUMMARY OF ARGUMENT.

The broad question before the Court is the freedom of the legal profession from unreasonable restrictions. Appellant was admitted to practice in Missouri in 1947 and to practice in Kansas in 1948. Thereafter he practiced in both states. By the amendment of its Rules 41 and 54 on December 15, 1958, and the decision below, the Kansas Supreme Court has determined that because he also practices in Missouri the appellant can no longer appear before Kansas courts without joinder of "local counsel." By vir-

tue of this ruling appellant has been effectively disbarred from practice in Kansas. The goodwill built up in a decade of practice has been destroyed and he has suffered a substantial loss of income.

The Kansas Supreme Court admittedly has the power to formulate rules for the furtherance of the administration of justice but that court cannot without violation of the Fourteenth Amendment enforce unreasonable rules so as to deprive a lawyer of his right to practice. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, affirmatively established that lawyers like all other persons are protected by the Fourteenth Amendment from arbitrary state action.

The Kansas court has acted arbitrarily and unreasonably. It admits that appellant is guilty of none of the misfeasance and malfeasance to which amended Rules 41 and 54 are purportedly directed. It attempts to hide the unreasonableness of the application of these Rules to appellant behind an ink screen of judicially noticed facts.

First, the Kansas court takes judicial notice that whereas the bulk of practicing attorneys in the Kansas City metropolitan area are officed in Missouri, the bulk of industrial litigation occurs in Kansas courts. The total lack of relevancy between this finding and appellant's (or any lawyer's) competence to appear in court is so patent as to manifest that the court's real concern is to improve the economic situation of Kansas lawyers who practice only in that state and not to improve the quality of justice administered in Kansas courts.

Second, the Kansas court purports to take judicial notice (without specifying when or where) that Kansas courts have experienced difficulty in getting service of papers and motions on Kansas licensed attorneys officed in Missouri. This has absolutely no applicability to ap-

pellant because he has both home and office in Kansas to which process can be mailed or served under the Kansas court's own rules for service of process. It is admitted that he has never failed to receive process and that no difficulty has been experienced in securing his presence in court. The Kansas court does not explain why its procedure for the service of notice works in the case of lawyers officed exclusively in Kansas, wherever this may be within the boundaries of the state, but does not work in the case of a lawyer officed in the same county as the court sending process if this lawyer happens also to have an office in another state a few miles from his Kansas office.

As a final ground, the Kansas court seeks to justify amended Rules 41 and 54 upon the finding that this is a day of specialization and that there is imperative need for specialists in Kansas law and procedure. The court chooses to ignore the fact that appellant and other lawyers in the same position as he have engaged extensively in the practice of law in Kansas courts. The court's reasoning rests upon the fallacy that a lawyer cannot be competent in Kansas procedure if he also practices in the courts of another jurisdiction.

Besides lacking justification as applied to appellant, the amended Rules are vague and uncertain. The Kansas court does not define what it means by "regularly engaged" in out-of-state practice. Apparently it intends an adjustable standard which can be fitted to the occasion. Such adjustability is incompatible with due process and rule of law. *Winters* v. *New York*, 333 U.S. 507.

Moreover, the amended Rules 41 and 54 deprive appellant of equal protection of the laws in violation of the Fourteenth Amendment. Appellant Martin and other Kansas attorneys similarly engaged in out-of-state practice,

who do not differ in any material respect from Kansas attorneys with practices limited to Kansas, are placed by the imposition of Rules 41 and 54 into the category of "foreign attorneys" with all of the disabilities attaching thereto. The Equal Protection Clause forbids different treatment of like classes. *Morey* v. *Doud*, 354 U.S. 457.

## ARGUMENT.

### I. Due Process.

The question before this Court relates in its narrow aspect to the arbitrary exclusion of an attorney from the full right to practice, but in its broader implications it touches upon the freedom of the legal profession from unreasonable restrictions--a freedom which this Court proclaimed in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, in dealing with those seeking admission to the profession. The Kansas Supreme Court paid deference to *Schware*, but the tenor of its opinion manifests a belief that a lawyer is completely subject to the dictates of the court. This philosophy is often summed up by saying that the practice of law is a privilege rather than a vested or natural right. For most of the courts which have made this assertion it has been a gratuity, an unnecessary appendage to a reasonable and conscionable denial of admission to practice or exclusion therefrom.[3] After all, ours is a govern-

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3. See *In re Isserman*, 345 U.S. 286 (disbarment for committing contempt of court in defending Communists); *Philbrook* v. *Newman*, 85 Fed. 139 (C.C. N.D. Cal.) (wrongful disbarment action wherein grounds for disbarment were found to exist); *Siegel* v. *Ragen*, 88 F. Supp. 996 (D.C. N.D. Ill.) (penitentiary inmate has no constitutional right to practice law by preparing habeas corpus petitions for other prisoners); *In re Greer*, 52 Ariz. 385, 81 P.2d 96 (disbarment for mismanagement of estate); *In re Harrison*, 231 Ind. 665, 109 N.E.2d 722 (disbarment after conviction of felony); *In re Meldrum*, 243 Iowa 777, 51 N.W.2d 881 (suspension of license for solicitation of business); *State* v. *Ros-*

ment of laws based upon natural principles of justice and equity. The statement that the practice of law is a privilege usually costs the maker nothing because it is rarely germane to the matter at hand. Yet confusion and injustice abound when the statement is so often repeated that a court comes to believe what is implied by it—that the lawyer's practice being a privilege, he has no rights against a court seeking to deprive him of his means of livelihood.

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*borough*, 152 La. 945, 94 So. 858 (conviction for unlawful practice of law); *Ayres* v. *Hadaway*, 303 Mich. 589, 6 N.W.2d 905) (lawyer on state bar inactive list has no right to engage in law practice); *State ex rel. Ralston* v. *Turner*, 141 Neb. 556, 4 N.W.2d 302 (requirement valid that bar applicant must have graduated from reputable law school or studied in law office); *Baker* v. *Varser*, 240 N.C. 260, 82 S.E.2d 90 (bar applicant failed to prove residence in state), *Ginsberg* v. *Kovrak*, 392 Pa. 143, 139 A.2d 889 (attorney admitted to federal court but not to state court in federal district enjoined from practicing law and maintaining office—right to practice in federal court not questioned); *In re Monaghan*, 167 A.2d 81 (Vt.) (refusal by bar examiners for adequate reasons to certify as to applicant's moral character and fitness); *State ex rel. Mackintosh* v. *Rossman*, 53 Wash. 1, 101 Pac. 357 (disbarment of generally dishonest attorney). And *cf. Starr* v. *State Board of Law Examiners*, 159 F.2d 305 (C.A. 7th Cir.) (damage suit for wrongful refusal to admit to bar); *Brents* v. *Stone*, 60 F. Supp. 82 (D.C. E.D. Ill.) (declaratory judgment proceeding to determine validity of Illinois Supreme Court rule relating to bar admission—allegation that bar examiners had failed applicants in order to secure additional fees in re-examination); *Petition of Florida State Bar Association*, 134 Fla. 851, 186 So. 280 (consideration of rules to regulate state bar); *Hulbert* v. *Mybeck*, 220 Ind. 530, 44 N.E.2d 830 (lawyers have no special interest entitling them to maintain action to enjoin illegal practices); *In re Casebier*, 129 Kan. 853, 284 Pac. 611 (statute valid requiring disbarment upon receipt of certified copy of judgment convicting attorney of felony or of misdemeanor involving moral turpitude); *Moity* v. *Louisiana State Bar Association*, 239 La. 1081, 121 So.2d 87 (bar applicant entitled to hearing on issue of his good moral character); *Petition for Integration of Bar of Minnesota*, 216 Minn. 195, 12 N.W.2d 515 (court has inherent power to promulgate order integrating state bar); *State ex rel. Rice* v. *Cozad*, 70 S.D. 193, 16 N.W.2d 484 (lawyers do not have property right so as to enjoin unauthorized practice); *Lamb* v. *Whitaker*, 171 Tenn. 485, 105 S.W.2d 105 (statute valid authorizing attorneys to bring suit to enjoin unlawful practice); *Ruckenbrod* v. *Mullins*, 102 Utah 548, 133 P.2d 325 (lawyer has duty to defend indigent persons); *Lathrop* v. *Donohue*, 10 Wis.2d 320, 102 N.W.2d 404 (order valid integrating state bar).

This notion has the capacity to destroy the independence of the legal profession and thus render the "profession largely incapable of performing the very kinds of services for the public that most justify its existence."[4] In a number of recent cases before this Court, lawyers or applicants for admission to practice law have claimed denial of constitutional rights, but in no case since the Civil War has this Court been confronted with an assertion of power over the legal profession analogous to that attempted by the Kansas court.

**A. Appellant Is Deprived of Substantial Interests.**

Appellant Keith Martin was admitted to practice in Kansas in 1948 by an order of the Supreme Court of Kansas. This order is for life or until disbarment for cause. His license gave him the right to appear in the Kansas Supreme Court and all inferior courts. Rule 41, *supra*, p. 4. No condition was attached to his license that he must not practice in another state. In *Dyche* v. *Crawford*, 183 Kan. 441, 327 P.2d 1047, decided in July, 1958, ten years after appellant's admission to practice in Kansas, the Kansas Supreme Court held that a resident lawyer who had been admitted to the Kansas Bar could not be deemed a "foreign attorney" within the meaning of Kan. G.S. 1949, 7-104 (*supra*, pp. 3-4) by reason of his having also been admitted to practice in another state.[5] Appellant practiced in Kansas and Mis-

4. Mr. Justice Black in *Cohen* v. *Hurley*, 366 U.S. 117, 135 (dissenting opinion).

5. The court said:

"It would seem clear that Section 7-104 has no application to lawyers who are admitted to the Bar of the state of Kansas."

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souri for ten years. By the amendment of Rules 41 and 54 late in 1958 and the decision below, the Kansas Court has deemed that appellant must now be joined by "local counsel." This ruling has in effect suspended his Kansas license. Henceforth he is to be treated as a "foreign lawyer" who is presumed to be incompetent in Kansas law and procedure, and who is to be allowed to appear in Kansas courts only if his client's interests are "safeguarded" by the presence of "local counsel." Appellant's status before the Kansas courts is therefore the same as a non-resident attorney who has not been admitted to the Kansas Bar. He is thus threatened with the loss of a practice built up through ten years of effort, and with the destruction of a part of his income."

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"Certain additional qualifying words have been added to the statute in ninety years and certain additional safeguards have been added, but it remains clear that the subjects of the section are attorneys at law admitted to practice in other states but not admitted to practice in Kansas." 183 Kan. at 443-44, 327 P.2d at 1049.

At the time of the *Dyche* case, Rule 41 did not have the final proviso that the present Rule does (*supra*, p. 5), and Rule 54 was applicable exclusively to "An attorney *residing* outside of this state" rather than—as it is now—"An attorney regularly *practicing* outside of this state" (*supra*, p. 5).

After the *Dyche* decision, the Rules were amended to their present form. The Kansas Supreme Court admits in its opinion below that the "practical effect [of the amended Rules] was to extend the statute's coverage to include those members of the Kansas Bar who regularly engage in the practice of law in another state" (R. 26).

6. Kansas formerly had a liberal policy of admitting attorneys of other jurisdictions to practice in its courts. Until 1935 foreign attorneys could practice in Kansas courts without joinder of local counsel. Gen. Stat. 1868, Ch. 11, sec. 4, provided that "any practicing attorney of any State or territory, having professional business in either the supreme or district court, may, on motion, be admitted to practice in either of these courts * * *." With Laws 1935, ch. 69 (G.S. 1935, 7-104), this long standing policy of liberality was abandoned. The core of present section 7-104 was contained in that statute. "Any regularly admitted practicing attorney in the courts of record of another state or territory, and not residing in the state of Kansas, having professional business

Appellant does not protest an insignificant and chimerical loss of liberty.[7] He has suffered an immediate, direct and drastic injury. A lawyer engages in practice, to be sure, to serve the public, but he does not do so without expectation of compensation. The income which a lawyer receives from his practice provides the means by which he and his family live. It is not a gift conferred by the state from on high but rather a return on the substantial investment in time, money and energy which he has made in preparing himself for his profession. The Kansas Court disclaims that it denies appellant the

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in the courts of this state" could on motion be admitted to practice "for the purpose of said business only" upon it being made to appear that *he or she was associated with a Kansas attorney residing in the judicial district in which the action was pending.* This statute, however, had a qualifying proviso "that regularly licensed practicing attorneys of other states, the laws of which states permit the practice in its courts of attorneys from this state, without a local attorney being associated with such attorney, shall not be required to comply with the provisions of this act." This reciprocal proviso was repealed by Laws 1939, ch. 83. Its short life was no doubt due to the fact that few foreign lawyers were made to join with Kansas local counsel because the neighboring states of Colorado, Nebraska, Missouri, Arkansas and Oklahoma, from which the bulk of out-of-state lawyers having Kansas business comes, either did not have a local counsel requirement or had some form of reciprocal provision. The present form of section 7-104 was enacted by Laws 1947, ch. 94 (G.S., 1947 Supp.). It contains, of course, no reciprocity provision.

Rule 54, which was adopted July 3, 1936, implemented the restrictive policy introduced by Laws 1935, ch. 69. The amendment of Rule 54 in 1958 so as to make it applicable to all lawyers *practicing* outside the state extended and perverted the policy of section 7-104.

7. The recent integrated Wisconsin Bar case, *Lathrop* v. *Donohue*, U.S. , differs materially from this case. The only interference with his liberty which Lathrop effectively substantiated was the exaction of annual dues of $15 to the State Bar. Lathrop contended that his constitutional rights of free speech would be infringed if his dues money were used to support the political activities of the State Bar, but the Court did not pass on this issue because he failed to show that the State Bar had utilized funds for specific purposes to which he was opposed.

right to practice before Kansas tribunals (R. 26),[8] which abstractly is true yet in substance false because the court's Rules as applied to him deprive him of the economic incentive which gives meaning to an individual's practicing law. Appellant cannot afford to engage in a practice from which someone else is entitled to a large portion of the emoluments for the sole reason of his compulsory presence.[9]

To say that appellant has been disbarred in Kansas may seem an overstatement, but when words are stripped of their husks and the real import of amended Rules 41 and 54 is laid bare, there is little to distinguish the action of the Kansas court from one of disbarment. In effect, appellant has been declared incompetent to appear alone in a Kansas court because of misconduct—the malfeasance being that he maintains an office and practice in another state besides Kansas. The good-will he has built up in his

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8. In *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190 (*supra*, pp. 5-6), the court pretended that amended Rules 41 and 54 had not brought about the consequences of which Martin complained. "Martin has not been singled out or made an example of and he has not been deprived of any right to practice law before the courts of this state but rather, by his own choice, he has brought himself within the amended portion of rule 41 which merely requires compliance with G.S. 1949, 7-104." 185 Kan. at 328; 342 P.2d at 193. In short, the court said that Martin had only to surrender his constitutional rights in order to be restored to good standing in Kansas!

9. According to the minimum fee schedules of the Johnson and Wyandotte County, Kansas, Bar Associations, local counsel require compensation of approximately one-third to one-half of the fee for their services (R. 4). To be sure, appellant could avoid having to associate with "local counsel" if he confined himself strictly to a Kansas office practice, but it is fanciful to imagine that he could do so. Even if prospective clients were not deterred from coming to him by the implications of incompetency in Kansas law, few clients would be interested in seeking the services of a lawyer who has only limited capacity to represent them in court. Appellant obviously cannot try contested court or jury cases when fees are small if he has to pay another lawyer to sit in court all day with him.

Kansas practice has been destroyed. No client will seek or retain him as counsel in a Kansas court any more. The public does not understand the subtleties of Rules 41 and 54. It believes that appellant is a blemished lawyer and that he no longer can fully and adequately appear in Kansas courts.

**B. The Kansas Court's Rules Are Subject to Due Process.**

The power of the Kansas Supreme Court to formulate rules in the furtherance of the administration of justice is admitted, but such power has a built-in limit consistent with reasonable and rational application. State courts are not less forbidden by the Fourteenth Amendment to deprive persons of their substantive rights than are state legislatures. *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Shelly* v. *Kramer*, 334 U.S. 1. The Fourteenth Amendment forbids the states to deprive *any person* of life, liberty or property without due process of law or deny him equal protection of the laws. A person is afforded protection without regard to his status or office. See *Truax* v. *Raich*, 239 U.S. 33; *Hines* v. *Davidowitz*, 312 U.S. 52; *Skinner* v. *Oklahoma*, 316 U.S. 535. Because a lawyer is an officer of the court he is not any less a "person." His status as an officer of the court binds him to a high standard of conduct, but it does not obligate him to surrender to the court rights which are constitutionally secured to every other person. It is immaterial that a lawyer does not have a "property interest" in his practice in the ordinary sense. The Fourteenth Amendment protects interests which are not strictly proprietary. *Thornhill* v. *Alabama*, 310 U.S. 88; *Staub* v. *City of Baxley*, 355 U.S. 313; *Meyer* v. *Nebraska*, 262 U.S. 390. The word "property" in the Amendment includes one's interest in one's profession and business as well as one's interest in one's chattels and realty. The "liberty" secured by the Fourteenth Amendment is

an assurance that one shall be protected in the right to use his powers of mind and body in any lawful calling. *Smith* v. *Texas*, 233 U.S. 630; *Meyer* v. *Nebraska*, 262 U.S. 390, 399.

Whatever those who have spoken of the "privilege"[10] to practice law may have had in mind, this Court firmly resolved the matter in *Schware* v. *Board of Bar Examiners*, *supra*:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent* v. *West Virginia*, 129 U.S. 114. Cf. *Slochower* v. *Board of Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183. And see *Ex parte Secombe*, 19 How. 9, 13. A State can require high standards of qualifications, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualification must have a rational connection with the applicant's fitness or capacity to practice law*. *Douglas* v. *Noble*, 261 U.S. 165; *Cummings* v. *Missouri*, 4 Wall. 277, 319-320. Cf. *Nebbia* v. *New York*, 291 U.S. 502." 353 U.S. at 238-239. (Emphasis added).
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> * * *
>
> "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless

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10. Admittedly, the right to practice law is not one of the "privileges" secured by the Privileges and Immunities Clause of the Fourteenth Amendment. This clause is narrowly limited to rights which an individual enjoys solely by virtue of his United States citizenship and does not include immunities one enjoys simply as a person. *Slaughter-House Cases*, 16 Wall. 36. Cases such as *Ex parte Lockwood*, 154 U.S. 116 and *Bradwell* v. *The State*, 16 Wall. 130, holding that the right to practice law is not a privilege or immunity of a citizen of the United States, have no significance as to the application of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Some of the courts which have spoken of the lawyer's "privilege" to practice law may have mistakenly supposed that *Lockwood* and *Bradwell* did interpret these latter clauses.

> of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that *a person cannot be prevented from practicing except for valid reasons.* Certainly the practice of law is not a matter of the State's grace. *Ex parte Garland*, 4 Wall. 333, 379." 353 U.S. at 239, footnote 5 (Emphasis added).

In *Schware* this Court dealt with state denial of admission to practice; the applicant had been rejected because of failure to establish "good moral character." Here the problem is one of state exclusion from practice after admission. The applicable constitutional principles are the same. It is inconceivable that the Fourteenth Amendment is concerned with admission to practice but is indifferent to the fate of the attorney afterward. If unreasonableness and arbitrariness are forbidden at the threshold of a legal career, as in *Schware*, when the burden of proof is on the applicant seeking admission, unreasonableness and arbitrariness are surely forbidden when the state has the burden and seeks to deprive a longstanding member of its Bar of the right fully to engage in practice. *Cohen* v. *Hurley*, 366 U.S. 117.

Many years ago, when the 1865 Congress sought to exclude Southern adherents from practice before federal courts, this Court said in *Ex parte Garland*, 4 Wall. 333, 379:

> "The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of

which he can only be deprived by the judgment of the court, for moral or professional delinquency."[11]

Thus in point of fact, *Schware* introduced no new legal principle.[12] *Schware* simply reiterated as to lawyers the principle which is implicit in the Fourteenth Amendment as to all persons, namely, that the state may not act arbitrarily, or, stated positively, that the means selected by the state and its agencies must have rational connection with an end the state is empowered to achieve under its police power. *Weaver* v. *Palmer Brothers Co.*, 270 U.S. 402.

It is submitted that amended Rules 41 and 54 lack such necessary reasonable basis as applied to appellant Martin. The Kansas Supreme Court has wholly failed to sustain the burden of establishing a rational connection between the revocation of appellant's right freely to represent clients

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11. It is this statement in *Ex parte Garland* to which Mr. Justice Black was no doubt referring when he cited the case in footnote 5 of the *Schware* opinion. See p. 23, *supra*, 353 U.S. at 239.

12. Prior to *Schware* a number of state and federal cases expressed the belief that the lawyer has a constitutionally protected interest in his practice. See *In re Fite*, 228 Ala. 4, 152 So. 246, 248 ("It need not be observed, that one having been duly admitted to his profession has a substantial interest and right therein, within the law, to enjoy its emoluments in its contribution to his livelihood, until he voluntarily forfeits or relinquishes that right, by the withdrawal of that permission according to the due process of law, or by physical hindrance."); *In re O'Bein's Petition*, 79 Conn. 46, 63 Atl. 777, 780 ("To disbar an attorney is to deprive him of what, within the meaning of our constitutions of government, may fairly be regarded as property."); *People* v. *Love*, 298 Ill. 304, 131 N.E. 809, 811 ("The right to follow either one of these professions [medicine, law and surgery] is one of the fundamental rights of citizenship."); *In re Applications for Admission to Practice*, 14 S.D. 429, 85 N.W. 992, 993. "It [the practice of law] was a vested right, of which he could not be deprived by an act of the legislature, and one of which he could be deprived only upon good cause shown, and after proper judicial proceedings."); *Keeley* v. *Evans*, 271 Fed. 520, 522 (D.C. Ore.) ("Without doubt, the right of an attorney to practice law is a property right, which can be taken from him only after judicial hearing and a fair opportunity to be heard in his own defense.")

in Kansas courts and any objective the court might legitimately attain in the exercise of its power to maintain the standards of the bar.

**C. The Kansas Court's Rules Are Arbitrary and Unreasonable.**

A rule like Rule 54 as applied to *foreign* lawyers, that is, lawyers *without residence or office* in Kansas,[13] has several conceivable justifications. One justification might be found in the assurance that local counsel will be available for the service of notice, whereas the foreign attorney without residence or office in the state might not be so available.[14] Another is that a foreign lawyer who has not regularly been admitted to practice in the state will perhaps be unacquainted with the law of the state and thus unable to represent his client's interests properly.[15]

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13. According to the summary of court rules and statutes in the American Bar Foundation Research Memorandum Series No. 1 entitled *Admission of Non Resident Attorneys Pro Hac Vice in State Courts and the District of Columbia*, about half of the states have some provision for the association of foreign attorneys with local counsel. It is generally clear from the wording of the court rules or statutes that it is non-resident attorneys or attorneys without office in the state, not regularly admitted to practice in the state, who are required to join with local counsel. In several states, however, there are rules or statutes with phraseology similar to amended Rule 54, which could literally be applied as the Kansas Supreme Court has applied its rules. *E.g.* Neb. Rev. Stat., sec. 7-103 (has reciprocity clause); Okla. Stat., Title 5, secs. 17.1 and 17.2 (Supp. 1959) (has reciprocity clause); Code of Va., sec. 54-42 (1950); Wash., Rule 7, Rules for Admission to Practice; Wyo. Stat., 1957, 33-49, and Rule 19, Vol. 2, p. 27. None of these statutes or rules appears to have been applied as amended Rule 54 has been.

14. In *Arshaud* v. *Griffin*, 202 Iowa 462, 210 N.W. 540, the court upheld an Iowa law which required a non-resident Missouri attorney to designate a local lawyer as agent to receive notices. But see *Letaw* v. *Smith*, 223 Ark. 638, 268 S.W.2d 3, where it was held that the rule of an Arkansas county chancery court precluding the prosecution of a suit therein by a non-resident attorney who had been admitted to practice in Arkansas, without association with an attorney residing in the county, was invalid as unreasonable. The rule was also in disharmony with the Arkansas reciprocity statute.

15. *Felton* v. *Rubow*, 163 Kan. 82, 179 P.2d 935.

The Kansas Supreme Court seeks to circumvent the obvious absence of any such relevancy of amended Rules 41 and 54 to appellant through the medium of extravagant judicial notice of facts—facts pertaining to hypothetical evils wholly without reference to him. The Kansas court evidently found these facts while in conference on the case for it did not previously note them in *Taylor* v. *Taylor*, 185 Kan. 324, 242 P.2d 190 (*supra*, pp. 5-6), when Rules 41 and 54 were under identical attack, nor were any such facts urged in the proceeding below by appellee or by the bar associations.

The Kansas court meticulously avoids ascribing to appellant any of the faults or inadequacies which are supposed to justify amended Rules 41 and 54. His competency, conscientiousness and integrity are admitted. He is given the apology that "in carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regrettably, that some of them may work a hardship on some member or group of members of the bar." (R. 29). Of course a state or its agency may lay down *reasonable* rules, and the scale of judgment as to their reasonableness is not too precise. *Otis* v. *Parker*, 187 U.S. 606; *Armour & Co.* v. *North Dakota*, 240 U.S. 510. When a rule has been found to be reasonable, the only remaining problem is the separation of those who fall under the rule from those who fall without; individual hardships do not count for much. *Samuels* v. *McCurdy*, 267 U.S. 188. Unfortunately, the Kansas court glosses over the inapplicability of these propositions to the matter at hand. Its amended Rules 41 and 54 are not reasonable, however insensitive the scale on which they are weighed. Furthermore, a person can not reasonably be brought within the ambit of any rule, whether reasonable or unreasonable *per se*, if his conduct is totally devoid of bear-

ing upon the evils which the rule is designed or supposed to dissipate.

**1. The Kansas court is endeavoring to set up interstate economic barriers.**

The Kansas court takes judicial notice that approximately 6/7 of the 2,100 practicing attorneys in the Kansas City metropolitan area are officed on the Missouri side of the state line (R. 27). The court then describes in some detail the great industrial areas in Wyandotte and Johnson County, Kansas, leaving the inference that the main litigation is in those counties and not in Missouri. It seems indeed strange that 1,800 of the 2,100 practicing attorneys should be in Missouri where there supposedly is little of this industrial business, leaving Kansas without adequate counsel, especially since under the implications of Rules 41 and 54 these Missouri lawyers are getting the Kansas business and the court feels litigants should hire local Kansas lawyers.[16]

The total lack of relevancy between a lawyer's competency to appear in court and the distribution of lawyers in relation to the quantity of litigation serves to emphasize the fact that the Kansas court is primarily concerned in its amended Rules with the erection of barriers for the eco-

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16. Although the Kansas Court's analysis of the economic situation seems decidedly distorted, it does point up that persons in the metropolitan area commonly live in one state but work or have business connections in the other. Many of such persons desire to have one attorney to represent them in both states. It has been customary since the Kansas legislature abolished the reciprocity rule in 1939 (see footnote 6, *supra*) for lawyers to seek admission in both Kansas and Missouri in order to be able to serve their clients better. Now, amended Rules 41 and 54 force many of these clients to an unhappy alternative. They must either give up their right to counsel of their own choice and employ for their Kansas litigation someone who qualifies as "local counsel" or they must employ additional counsel whom they do not want or need.

nomic protection of Kansas lawyers engaged in one-state practice.[17] Yet, the United States is more than a collection of states; it is a unified nation to the formation of which this Court has greatly contributed. Freedom of movement and the right of the individual to conduct affairs in several states has been zealously guarded. *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Edwards* v. *California*, 314 U.S. 160. In the latter decision the Court significantly remarked:

> "It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting gates to the outside world. But, in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.' Baldwin v. Seelig, 294 U.S. 511, 523." 314 U.S. at 173.

**2. The Kansas court ignores its own rules for service of process.**

The Kansas court purports to take judicial notice that Kansas courts have experienced difficulty in getting service of papers and motions on Kansas licensed attorneys officed in Missouri and in securing the presence of Kansas licensed attorneys officed in Missouri (R. 28). It is strange that no allusion was made to any such difficulties in the trial court (R. 11) or in *Taylor* v. *Taylor* (*supra*, pp. 5-6); stranger yet that the court's rules for the serv-

17. In this regard, it is interesting to note that four bar associations filed *amicus* briefs in the court below (R. 19). *Cf.* Mr. Justice Black's comment in *Cohen* v. *Hurley*: "The true nature of the underlying controversy in this case, as a controversy between economically competing groups, lawyers, is shown by the fact that four different associations of lawyers filed briefs *amicus curiae* in the present proceeding * * *." 366 U.S. at 148, fn. 37 (dissenting opinion).

ice of notice[18] works satisfactorily in respect to Kansas lawyers with home and office located at points in Kansas remote from the Wyandotte and Johnson County courts, but works unsatisfactorily in respect to Kansas lawyers with home and office in Wyandotte or Johnson County who also happen to have an office in nearby Kansas City, Missouri; and also strange that telephone communication is available as to one group of lawyers but not as to another. It is wondrous that Missouri-officed Kansas lawyers as a class are more remiss than their Kansas-officed brethren in appearance in court and that this remissness can be attributed to the few extra minutes driving time by which their Missouri offices are farther from Kansas courthouses than some Kansas offices.[19] Indeed, it is little short of phenomenal that having a law office in Missouri is the cause of so much difficulty, especially when the Kansas lawyer can maintain a real estate business, drive a taxi or raise chickens in Missouri presumably without being derelict to Kansas.

The Kansas court's hypothetical grounds are premised on a confusion of the "foreign attorney" without residence or office in Kansas, falling within G.S. 1949, 7-104, *supra*, pp. 3-4, and the Kansas attorney regularly practicing in Kansas with residence and office there who is affected by

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18. G.S. 1949, 60-3827, Rule 44 of the Kansas Supreme Court, governing practice in district courts, provides:

> "Counsel filing a motion or demurrer or pleading subsequent to the petition shall, on the day the same is filed, deliver or mail a copy thereof to counsel of record for all adverse parties."

And see to similar effect Kan. G.S. 1949, 60-722, 60-723, 60-3306, see also *Von Der Heiden v. Williams Estate*, 162 Kan. 233, 175 P.2d 117 (requirement of 60-3306 that notice of appeal "must be personally served," met by registered mail service)

19. Expressways link downtown Kansas City, Missouri, with Olathe, Kansas, the county seat of Johnson County, and with Kansas City, Kansas, the county seat of Wyandotte County. Convenient highways and streets bind all these communities together.

amended Rules 41 and 54 because he also practices in Missouri. It is somewhat ironical that neither G.S. 1949, 7-104, nor amended Rules 41 and 54, nor any other Kansas statute or rule requires that a Kansas lawyer have either his office or his residence in the state.[20] Therefore, a lawyer conceivably could confine his practice to Kansas and yet not be housed nor officed there. He would suffer a slight disability in not being able to function as "local counsel,"[21] but that is all.[22]

Appellant Martin has both home and office in Kansas to which process can be mailed or served under the Kansas court's rules.[23] Until the amendment of Rules 41 and 54, he could serve as "local counsel."[24] It is admitted that he has never failed to receive process and that no difficulty has been experienced in securing his presence in court. To require him to employ co-counsel (whose actual availability for service of process is in fact immaterial, it being demanded only that he does not practice regularly in Missouri) is manifestly unnecessary and unreasonable. To be sure, appellant may not always be

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20. An applicant to take the bar examination must be a resident of Kansas or a graduate of a Kansas law school (Rule V, Kansas State Board of Law Examiners, 186 Kan. xx).

21. G.S. 1949, 7-104, provides that "said associate attorney shall be a resident of and maintain his law office within the judicial district in which said action is filed or pending." See *supra*, p. 3.

22. Because no statute or rule requires a Kansas licensed lawyer to be a resident of Kansas, it would seem that if a Kansas lawyer had neither an office nor residence in Kansas, the Kansas Supreme Court could make a reasonable rule for service of process, such as service upon the clerk of the court or upon a designated agent, or by mail as provided in Missouri Supreme Court Rule 3.03 b.

23. See footnote 18, *supra*.

24. *Lindbloom* v. *Lindbloom*, 177 Kan. 286, 279 P.2d 243; *Rhea* v. *Kansas City Power & Light Co.*, 176 Kan. 674, 272 P.2d 741.

in his Kansas office, but it can hardly be expected of a lawyer that in order to remain in good standing at the bar he confine himself day and night to his office. If amended Rules 41 and 54 can be applied to a resident Kansas attorney because he is absent from the state for periods of time to care for his Missouri practice, then a similar restriction can be applied to any Kansas lawyer who absents himself from the state for any reason whatever. Viewed from this logical extreme it may become risky for a Kansas lawyer to do otherwise than confine himself to perpetual seclusion in Kansas. The mere possibility that some day appellant might be unavailable is no justification for barring him from the Kansas courts unless he appears with local counsel. *Adams* v. *Tanner*, 244 U.S. 590.

**3. The Kansas court erroneously believes that specialization follows state lines and not subject matter.**

The Kansas court further seeks to justify amended Rules 41 and 54 upon "the consideration that in the past decade or so the manner in which law is practiced has tended to swing with emphasis to the specialist." * * * "Litigation invokes statutory laws, rules of courts, and peculiarities of local practice requiring special knowledge and opinions. Such matters are best handled by a local attorney who constantly deals with problems arising in a variety of situations. Trial work requires immediate decisions—there is little time for reflections and research. Only the lawyer with considerable experience in a particular forum can adequately and consistently render high-level service in the area of local procedure." (R. 31.)

Kansas does not have a class of barristers whose functions are clearly delineated from those of solicitors. An "office attorney" with no trial experience whatsoever is

perfectly free to try any case in any Kansas court. Thus Kansas lawyers may practice before any Kansas court, whether they are familiar with local peculiarities or not, and they are not required to be joined by "local counsel." The Kansas Supreme Court appears to think that specialization depends upon state lines rather than on subject matter; *sub silentio* it assumes that the Kansas-Missouri lawyer who specializes, shall we say, in personal injury litigation knows less about the Kansas Workmen's Compensation Law and practice before the Kansas Workmen's Compensation Commission than does a lawyer practicing exclusively in Kansas who deals solely with tax matters or real estate or probate practice. The absurdity of this assumption destroys the reasonableness of the amended Rules.

The Kansas court tries to give the impression that it is striking at those who have virtually no practice in Kansas, that is, "foreign attorneys" under G.S. 7-104. Yet Rules 41 and 54 are not applicable solely to "foreign attorneys," but also to Kansas-domiciled lawyers regularly practicing in Kansas. The latter have had experience in Kansas trial procedure and most are competent trial lawyers, as appellant admittedly is,[25] and are far more able to represent

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25. Appellant was admitted to the Kansas Bar in 1948 after successfully taking the Kansas bar examination. Since his admission appellant has practiced law in the Kansas courts and has argued cases before the Kansas Supreme Court. He has been appointed by the State of Kansas to represent it in trial matters before the courts. He has been City Attorney for Mission, Kansas, since 1951. He has been a member of the Board of Tax Appeals of the State of Kansas (1958-1961). (R. 2-4.)

In the face of this evidence, for the Kansas court to conclude that he lacks necessary familiarity with Kansas law, or is in confusion concerning it, from the mere fact that he has contact with the law of Missouri, is far more irrational and untenable than the conclusion condemned by the unanimous Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. Indeed, it would appear that appellant's knowledge of the laws of both states has been advantageous to Martin's clients. See *Goodrich* v. *Hammond*, 280 F.2d 501 (C.C.A. 10th Cir.)

clients in the Kansas courts than is an inexperienced Kansas office lawyer or a recent graduate, either of whom will eminently qualify as "local counsel" under Rules 41 and 54. Without the trouble of investigating realities, the Kansas Supreme Court has characterized a certain group of Kansas practitioners as incompetent to appear without assistance, as "non-specialists in Kansas procedure," simply because they also practice "regularly" in Missouri. It is patently ridiculous to say that if a man devotes some time to learning Missouri practice and procedure, he is thereby rendered incompetent in Kansas procedure. The same would be true regarding federal practice or the procedures before the myriad of administrative agencies not exclusively of Kansas origin or location. Does regular practice and appearance before the Supreme Court of the United States disqualify a lawyer from practice in the Kansas courts without joinder of local counsel?

**4. The amended rules are vague and uncertain.**

The Kansas court does not define what it means by "regularly engaged" in out-of-state practice. Apparently the court intends to embody flexibility and latitude in Rules 41 and 54 so that they may be applied whenever a Kansas court feels that a Kansas attorney has exceeded his proper quota of out-of-state practice. Economic vagaries and the whims of the courts are to determine whether one Missouri client or fifty makes a Kansas lawyer ignorant of Kansas law and procedure, and incompetent to appear in a Kansas court without association of local counsel. The concept of the rule of law is rooted in the constancy of norms which do not vary with the exigencies of particular cases, the influence or lack of influence of the parties, or the disposition of the judge. The rule of law is embedded in the Fourteenth Amendment. Vague, un-

certain standards, like the Rules of the Kansas court, which afford no guidance and give no adequate forewarning that certain conduct is forbidden, offend the due process clause. *Winters* v. *New York*, 333 U.S. 507; *Musser* v. *Utah*, 33 U.S. 95.

In sum, therefore, the Supreme Court of Kansas has failed to justify the imposition of its "local counsel" rule upon appellant Martin, a qualified member of its Bar who maintains an office, practices and resides in Kansas. Preventing appellant from engaging in Missouri practice certainly has no demonstrable relation to the better administration of justice in Kansas. And no rational relation exists between amended Rules 41 and 54 and the qualifications which Kansas imposed upon appellant at the time of his admission to the Bar. *Schware* v. *Board of Bar Examiners, supra; Ex parte Garland, supra.* Whatever may be the power of the Kansas court to attach a condition to the license of an attorney admitted after December 15, 1958, when the Rules were amended, the court cannot deprive a previously admitted, long-standing and qualified attorney of the fruit of years of preparation and practice. As amended and applied to appellant by the Supreme Court of Kansas, Rules 41 and 54 are unreasonable and arbitrary, and deprive appellant of due process of law.

**II. Equal Protection.**

Amended Rules 41 and 54 also deprive appellant of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause voids specious or fanciful classifications which cause some persons to be treated differently from others when they are actually similarly situated; the classification must bear a substantial relation to a legitimate objective of the State. *Morey* v. *Doud*, 354 U.S. 457;

*Skinner* v. *State of Oklahoma*, 316 U.S. 535; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389. As stated by the Court in *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527:

> "The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415; *Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 37; *Air-Way Electric Appliance Corp.* v. *Day*, 266 U.S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 160."

The classification resulting from the application of Rules 41 and 54 to attorneys such as appellant lacks any "rational basis" and is "palpably arbitrary." Appellant Martin and other Kansas attorneys similarly engaged in out-of-state practice by the imposition upon them of Rules 41 and 54 are placed in the category of "foreign attorneys" with all the disabilities attaching thereto. Although they may practice outside the State, they do not differ demonstrably as to legal knowledge, availability, capacity or moral qualities from Kansas attorneys with practices limited to Kansas who are not subjected to the onerous restrictions of Rules 41 and 54. A licensed Kansas attorney demonstrates no absence of qualities necessary for the practice of law in Kansas and offends against no constitutionally valid policy of Kansas merely by virtue of additional practice in another State; this has been shown above in respect to the matter of denial of due process. By parity of reason the fact that a Kansas attorney also practices outside the state is an insubstantial, speculative and remote basis of discrimination, and a classification resting thereon does not "rest upon some ground of differ-

ence having a fair and substantial relation to the object of the legislation." *Allied Stores of Ohio* v. *Bowers, supra.* The Fourteenth Amendment guarantees not only equal protection of the laws but also the protection of equal laws. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 350.

## CONCLUSION.

For the reasons stated, the judgment of the court below should be reversed; Kan. G.S. 1949, 7-104, and amended Rules 41 and 54 of the Kansas Supreme Court should be declared to be in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment as applied to appellant; and the court below should be directed to make permanent the writ of mandamus allowing appellant to appear in appellee's court without local counsel.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

## No. 30.

KEITH MARTIN,
*Appellant,*

vs.

JOSEPH S. DAVIS, As Probate Judge
of Johnson County, Kansas,
*Appellee.*

APPEAL FROM THE SUPREME COURT OF THE
STATE OF KANSAS.

## BRIEF OF WILLIAM M. FERGUSON, ATTORNEY GENERAL OF THE STATE OF KANSAS, AMICUS CURIAE.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

## BRIEF OF WILLIAM M. FERGUSON, ATTORNEY GENERAL OF THE STATE OF KANSAS, AMICUS CURIAE.

### STATEMENT.

This is an appeal from the decision of the Supreme Court of Kansas[1] affirming a judgment of the District Court of Johnson County, Kansas, quashing appellant's alternative writ of mandamus. By this writ appellant

1. *Martin v. Davis, Probate Judge*, 187 Kan. 473, 357 P.2d 782

sought to be permitted to practice law in the Probate Court of said county without asosciating with himself an attorney residing and maintaining an office in said county, which constitutes the Tenth Judicial District of Kansas. The controversy arises out of certain rules of the Supreme Court of Kansas regulating the practice of law in that state. The appellant Martin was admitted to practice law in all the courts of Kansas by the Supreme Court on February 12, 1948, some six months after he was admitted to the bar of Missouri. As to his professional qualifications and his personal character there is no question. He is a resident of Johnson County, Kansas, which county adjoins the City of Kansas City, Missouri, in which city appellant maintains his law office and which is the place where most of his office practice is carried on. He also maintains an office at his home in Johnson County, Kansas.

In March, 1959, Martin filed the divorce action of Taylor vs. Taylor in the District Court of Wyandotte County, Kansas.[1] His right as a member of the Missouri bar to file said case was challenged by a motion to strike the petition from the files. The trial court ordered him to associate with himself "local counsel pursuant to amended court rules 41 and 54". Having failed to do so, the petition was ordered stricken. An appeal was taken from this order to the Supreme Court of Kansas,[2] which affirmed the judgment of the trial court. Thereafter that decision was appealed to the Supreme Court of the United States. This appeal was dismissed for want of a substantial federal question.[3]

Thereafter appellant commenced the present action in the District Court of Johnson County, Kansas, for an order

2. *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190.

3. *Taylor* v. *Taylor*, No. 552, 1959, 361 U.S. 374.

of mandamus requiring the appellee Davis, as Probate Judge of Johnson County, Kansas, to permit appellant to file cases in the Probate Court and to appear therein and try them without associating with himself local counsel as required by Rules 41 and 54 of the Supreme Court, and to declare said rules unconstitutional and void as contravening the fourteenth amendment to the federal constitution. The trial court quashed the alternative writ and Martin appealed to the Supreme Court of Kansas, which affirmed the ruling of the trial court, and it was held that the rules in question were not in violation of the due process and equal protection clauses of the Fourteenth Amendment. It is to review this decision that the present appeal is taken.[4]

The opening sentence of the opinion of the Supreme Court of Kansas, in deciding this case when before it, succinctly states the problem now before this court. Said statement reads as follows:

> "At issue is the power of the Supreme Court of Kansas to control and supervise the practice of law by Kansas licensed attorneys regularly engaged in the practice of law in another state."

It is because of this aspect of the case that the Attorney General of Kansas believes it desirable that this brief, *amicus curiae*, should be presented to this court.

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4. *Martin* v. *Davis, Probate Judge*, 187 Kan. 473, 357 P.2d 782.

## ARGUMENT.

### I.

### Rules 41 and 54 Have As Their Basis the Exercise of the Police Power to Promote the General Welfare.

Rule 41 in its present form was adopted in 1958. It relates to admissions to the bar, but by said amendment the order of admission is subject to the following limitation:

> "provided further, however: the authority to practice law shall not be exercised except as provided by Rule 54, infra, when the licensee has been admitted to the bar of another state or territory and is regularly engaged in the practice of law in such other state or territory."

Rule 54, also adopted in 1958, above referred to is as follows:

> "An attorney regularly practicing outside of this state and in good standing as a member of the bar of the place of his regular practice may be recognized as an attorney by the courts, commissions and agencies of this state, for any action or proceeding, but only if he has associated with him as attorney of record in such action or proceeding, a member of the bar of this state qualified under the provisions of G.S. 1949, 7-104, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record."[5]

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5. These rules as amended and in force at the time this action was commenced are published in 186 Kansas Reports at pages XVII and XIX, respectively.

In the Kansas Supreme Court, appellant limited his case to an attack on these two rules, contending (1) that the Supreme Court did not have power to adopt these rules; (2) that these rules were not in effect when he was admitted to practice in 1948; (3) that these rules violated the due process and equal protection clauses of the fourteenth amendment to the federal constitution; and (4) undue hardship to appellant by reason of loss of income. The court rejected all these contentions and specifically held that said rules did not violate said constitutional provisions. In the present appeal Martin presents the constitutional question as related to these rules. The question now before this court is the validity of the rules when tested by the constitutional requirements of due process and equal protection.

With reference to the judicial branch of government, the Constitution of Kansas provides that:

> "The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace and such other courts, inferior to the supreme court as may be provided by law."[6]

By Art. III, Sec. 3, the jurisdiction of the Supreme Court is stated as original jurisdiction in cases of quo warranto, mandamus and habeas corpus, and such appellate jurisdiction as may be provided by law. Nowhere in the constitution is there an express grant to that court of any power over admissions to practice law or of any power to regulate or discipline attorneys who have been admitted to the bar. This absence of express authorization is now covered by statute,[7] but in a disbarment case[8] it was

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6. Kansas Constitution, Art. III, Sec. 1.

7. G.S. 1949, 7-103, and 7-111 to 7-116.

8. *In re Gorsuch*, 113 Kan. 380, 384, 214 Pac. 794.

argued that the supreme court has no jurisdiction over such proceedings since the jurisdiction of the supreme court as fixed by the constitution could not be enlarged by legislative action. The court rejected this contention, saying that such authority would exist even if there were no statute. Some years previously it had been held that the power to admit to the practice of law is a judicial, and not a legislative function and is vested in the courts only.[9] This is in accord with the statement of this court that admissions to practice law and exclusions therefrom are not the exercise of a mere ministerial power, but the exercise of judicial power.[10] The power to regulate the practice of law is inherent in the state supreme court, nevertheless statutes which grant such power to the courts are more than a mere gesture, and indeed have a useful function. This was the subject of comment in a disbarment case[11] where a statute required the court to enter an order of disbarment upon receipt of a certified copy of a judgment of an attorney's conviction of a felony, and it was argued that this violated the letter and spirit of the fourteenth amendment. The court there said:

> "While it is inherently a judicial function of courts to control the conduct of attorneys and within limits courts have power to say who may and who may not practice before their tribunals (In re Gorsuch, 113 Kan. 380, 384 and 385, 214 Pac. 794), yet it is the indisputable prerogative of the legislature to declare the public policy of the state; and it is a highly pertinent and proper exercise of that prerogative for the legislature to declare that only persons of special qualifications and of good moral character can be ad-

9. *Hanson* v. *Grattan*, 84 Kan. 380, 115 Pac. 646.

10. *In re Garland*, 4 Wall. 333, 18 L. Ed. 366, 370.

11. *In re Casebier*, 129 Kan. 853, 856, 284 Pac. 611.

> mitted to practice law, and that if that status of good moral character is shown to have been lost, as by proof of conviction of a felony or misdemeanor involving moral turpitude, the right to practice law is at an end."

The foregoing is not without a material bearing on the present case, for as long ago as 1935[12] the legislature of Kansas laid down the public policy of the state with reference to practice in Kansas courts by attorneys from other states. It is the special province of the legislature to determine what the public policy of the state shall be.

> "The right to determine what is the best policy for its people is in the legislature and courts cannot assume that they have a wisdom superior to that of the legislature."[13]

Previous to enactment of the 1935 act, the statute merely provided that any practicing attorney of any state, having business before the district or supreme courts of Kansas, might on motion and taking the usual oath be admitted to practice in either of said courts. It is reasonable to infer that this liberal provision did not prevent abuses and that the circumstances were brought to the attention of the legislature, which in its wisdom endeavored to provide against what it considered to be an obstacle to the proper administration of justice.

Evidently the 1935 law did not provide a sufficient remedy. It contained a reciprocity provision which was eliminated by an amendment in 1939. A further amendment to its present form was made, L. 1947, Ch. 94. This now appears as G.S. 1949, 7-104, the pertinent part of which is as follows:

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12. L. 1935, Ch. 69.

13. *McAllister* v. *Fair*, 72 Kan. 533, 536, 84 Pac. 112.

"Any regularly admitted practicing attorney in the courts of record of another state or territory having professional business in the courts or before any board, department, commission or other administrative tribunal or agency of this state, may, on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon taking the oath as aforesaid and upon it being made to appear by a written showing filed therein, that he has associated and personally appearing with him in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state upon whom service may be had in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on such foreign attorney, within this state, and such foreign attorney shall thereupon be and become subject to the order of and amenable to disciplinary action by the courts, agencies or tribunals of this state: Provided, That in all actions before a court of record said associate attorney shall be a resident of and maintain his law office within the judicial district in which said action is filed or pending. No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding, while the same is begun, carried on or maintained in violation of the provisions of this section."

This statute, in its various forms, is the background and the occasion of Rules 41 and 54. Pursuant thereto the Supreme Court, in 1936, adopted Rule 54, which differs from its present form in that it required only that the associated attorney be a resident of the state. This did not quite conform to the statute and by the 1958 amendment it was required that the associated counsel be "a member of the bar of this state qualified under the provisions of G.S. 1949, 7-104." At the same time Rule 41, relating to admissions to the bar and which had hitherto remained un-

changed, was amended by the addition of the provision th the right to practice should not be exercised except as pr vided under Rule 54. The legislature having declared t public policy of the state, the Supreme Court, in obedien to this legislative declaration of public policy, and in t exercise of its inherent and statutory powers, adopted t rules now in question to implement the statutory manda

II.

**The Rules in Question Are a Reasonable and Valid Exercise of the Police Power.**

The exercise of police power has been circumscrib by the Supreme Court of Kansas as follows:

> "The police power is said to be inherent in gover ment, but can only be exercised by authority of legi lative enactment. It is for the legislature to determi what laws are needful and appropriate to promote t public welfare and to prevent the infliction of publ injury. So long as the legislature, in attempting exercise this power, does not violate any of the pr visions of the organic law or encroach upon some pow vested in congress by the federal constitution, the e ercise of its discretion is not subject to review by t courts."[14]

In the present case appellant contends that Rules and 54 go beyond a proper exercise of the police power that they are unreasonable and arbitrary and hence viola the due process and equal protection clauses of the fou teenth amendment. If this be correct, these rules ma by the Supreme Court of Kansas cannot be enforced again appellant.

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14. *Balch* v. *Glenn*, 85 Kan. 735, 741, 119 Pac. 67.

**1. The matter to which these rules relate is a subject proper to be protected by the police power.**

The purpose of the rules in question is to promote the administration of justice in the State of Kansas and to enable its courts to function more efficiently. This is definitely a matter which affects the public welfare of the state and its citizens. The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as the public health, morals and safety.[15] The promoting the administration of justice is a legitimate public purpose, one which is entitled to the protection afforded by regulations promulgated under the police power of the state. Supervision of the practice of the learned professions has long been held a subject for regulation under the police power.[16]

**2. The rules in question are reasonable under the existing circumstances.**

The validity of a police regulation depends upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose.[17]

From what has already been said, it is clear that the rules in question, and the statute on which they are based, were not the result of any hasty impulse. Their history, extending over a quarter of a century, and the various changes made to secure better results, indicate the serious

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15. *Chicago, B. & Q. Ry.* v. *Illinois*, 200 U.S. 561, 50 L. Ed. 596, 609.

16. *Dent* v. *West Virginia*, 129 U.S. 114, 32 L. Ed. 623. To like effect see *State* v. *Creditor*, 44 Kan. 565, 24 Pac. 346; *Meffert* v. *Medical Board*, 66 Kan. 710, 72 Pac. 247.

17. *Chicago, B. & Q. Ry.* v. *Illinois*, 200 U.S. 561, 50 L. Ed. 596, 609.

nature of the problem and the difficulty in dealing with it. The existence of an evil for which a remedy was indicated may properly be inferred from the enactment of a police regulation by the legislature and its subsequent validation, after challenge, by the State Supreme Court.[18] But aside from such inference, the statutes and Rule 54 expressly refer to one phase of the problem. Each of them, beginning with the 1935 Act, expressly states that one purpose to be served by the local counsel was to expedite and facilitate the service of notices and other papers necessary in the progress of the litigation. Evidently some difficulty had occurred in such matters where the attorney lived in another state. There was always the possibility of loss or delays, real or feigned, in the United States mail. This difficulty, with its attendant delay, would be obviated by requiring the association of local counsel who could easily and promptly be served, and who would be amenable to the court's discipline, as a lawyer in another state might not be.

A further reason for the regulation is that counsel from another state may not be sufficiently versed in the law of Kansas to give his client the best service or to be of any real assistance to the court. An example may be found in a case where plaintiff's attorney, although admitted to the bar of the Kansas Supreme Court in 1891, had long resided in another state and took no cognizance of substantial changes in the Kansas probate law enacted during his absence.[19] In a later case the Kansas Supreme Court dwelt on this phase of the matter and suggested the further ground of amenability to the court's orders:[20]

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18. *O'Gorman & Young* v. *Hartford F. Ins. Co.*, 282 U.S. 251, 75 L. Ed. 324.

19. *Felton* v. *Rubow*, 163 Kan. 82, 179 P.2d 935.

20. *Thornburg* v. *McClelland*, 186 Kan. 23, 348 P.2d 617.

> "It may be observed that the purpose of the statute is two-fold. It has been believed that lawyers not regularly practicing in the state are not usually familiar with the law and procedure thereof and that the public is entitled to have adequate counsel; and second, that the trial court should have complete and immediate jurisdiction over counsel appearing in the case."

While the problem of law practice by attorneys from another state is particularly acute in the Kansas City area, it is also a live issue in all the other 41 border counties of Kansas, and also arises in the interior counties frequently. The situation was grave enough to demand the attention of the legislature in 1935, and again in 1939 and again in 1947 when the statute now in force was enacted. The legislature concluded that the difficulties of service of notice, of amenability to the court's orders, and of lack of adequate knowledge of Kansas laws arising from efforts of lawyers from other states constituted a public evil.

**3. The remedy provided by the statute and rules has a substantial relation to a public purpose.**

Acting under its police power, the legislature, in the exercise of its wisdom and discretion, undertook to provide a remedy by placing restrictions upon such practice. This the legislature could do.

> "It is well established that when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adapt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. (Citations) With the wisdom of the exercise

> of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature—a notion foreign to our constitutional system.[21]

The effect of the statute and rules in question is not to prevent lawyers admitted and regularly practicing in other states from trying their cases in Kansas Courts. All that is required of them is that they associate with themselves local counsel upon whom notices can be served, who are more closely under the supervision of the court, and who can supply needed information as to Kansas law. The object of such requirement is merely to remove what doubtless experience had proved to be a hindrance to the work of the courts. This limitation upon the activity of lawyers from other jurisdictions is not unreasonable and bears a substantial relation to the ills sought to be remedied.

Appellant complains that the Kansas Supreme Court violated its own rule that judicial notice will not be taken of what occurred in cases other than the one on trial. Such is the rule as to the record in other cases, but the objection made is not good. In considering statutes passed in the exercise of the police power, it is presumed, from the fact that the legislature acted, that it did so on sufficient grounds.[22] It would seem from this that the burden of showing that there were no sufficient grounds for the enactment of the statute or the adoption of the rule rests upon appellant.

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21. *Purity Extract & T. Co.* v. *Lynch*, 226 U.S. 192, 57 L. Ed. 184, 187.

22. *Rast* v. *Van Deman and Lewis Co.*, 240 U.S. 341, 60 L. Ed. 679.

In the opinion of the Kansas Supreme Court reference is made to geographical situation, population and location of industries in the area. These are facts of which the court could take judicial notice. Mention was also made of the volume of litigation in the area. Statistics on this subject are annually assembled and published by the Judicial Council. Copies thereof are supplied gratis to all lawyers, libraries, newspapers and citizens who request it. This information is thus easily available to everyone. Reference was also made to the number of lawyers in the area, but this information can be obtained from any legal, city or telephone directory. It is not contended that the facts stated by the court are incorrect, and appellant suffered no harm from the court's consideration of them.

The rule referred to by appellant excludes from consideration in a contested lawsuit the record of some other case; but that is not the situation here. When the opinion refers to the difficulties experienced in procuring attendance of lawyers regularly practicing in other states, and in procuring service on them, and in the lack of familiarity with Kansas law, the court did not rely upon the records of other cases but upon its judicial knowledge gained over the years. The matters referred to reflect, not the record, but the court's long experience, and are stated in explanation of the reasons which moved the court to adopt the rules in question. Surely judges ought not to be expected to ignore the things their experience on the bench has taught them. "This court is entitled to take knowledge of its own acts and those of its chief justice."[23]

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23 *Anderson* v. *Madden*, (Ore.) 288 P.2d 823.

III.

**Being a Valid Exercise of the Police Power, the Rules in Question Do Not Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.**

The due process clause is a limitation on the police power to the extent of preventing the arbitrary or unreasonable exercise of that power;

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[24]

The difficulties in various situations arising from the efforts of attorneys from other states to practice in the Kansas courts, the wide extent of the problem, especially in the border counties, and the long continued and repeated efforts of the legislature and the court to secure more adequate safeguards against what was deemed a hindrance to the work of the Kansas courts, supply the background for the adoption of Rules 41 and 54 as they now exist. They demonstrate that substantial reasons existed for the promulgation and enforcement of these rules. And the means selected to combat these hindrances have a real and substantial relation to the end sought to be accomplished. These rules, therefore, do not contravene the due process clause.

Equal protection of the laws means that like treatment must be accorded to all in like circumstances. Classification is not forbidden provided the distinctions made are reasonable[25] and not arbitrary and are founded

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24. *Nebbia* v. *Peo.*, 291 U.S. 502, 78 L. Ed. 940.

25. *Puget Sound P. & L. Co.* v. *Seattle*, 291 U.S. 619, 78 L. Ed. 1025.

upon substantial differences which have a reasonable relation to the persons dealt with and to the public purpose sought to be accomplished. The statute and rules in question meet this test. The distinction they draw is between lawyers regularly admitted and practicing in another state who desire to try cases in Kansas, on the one hand, and those admitted to practice in Kansas and regularly practicing there.

This line of demarcation is reasonable. Even the most capable lawyer whose major preoccupation is with the law of his own state is likely not as conversant with Kansas law, substantive and procedural, as is the lawyer who gives these subjects his constant attention. In addition, the lawyer regularly practicing elsewhere may not be available for prompt service of papers upon him nor is he easily amenable to the orders of the court as is local counsel. These are not merely occasional situations nor is their hindrance to the work of the courts imaginary, and the legislature and the Supreme Court were entitled to provide a remedy. The remedy chosen had a reasonable relation to the persons dealt with and to the public purpose sought to be accomplished.

> "It is established that a distinction in legislation is not arbitrary if any state of facts reasonable can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed * * *. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety * * *. It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare * * *. And we repeat 'it may make discriminations if founded on

distinctions that we cannot pronounce unreasonable and purely arbitrary'."[26]

The result of classification is that those within the class have rights or suffer burdens which others do not. Appellant complains of the specific hardship to which the restriction subjects him; but the fourteenth amendment does not purport to protect against every injurious or oppressive action by a state.[27] It may be that because of his Kansas residence and his experience with Kansas law, the statute and the rules in question operate more severely on appellant than they do upon most lawyers who practice in some other state. However, it must be remembered that Sec. 7-104, in its present form was in force when he applied for a license to practice law, as was also G.S. 1949, 603825, authorizing the Supreme Court to "make and amend" rules to regulate procedure in the Supreme Court and inferior courts. Appellant must have known of these statutes and consented to them, and that when such rules were so made or amended, he would be subject to them. By his own voluntary choice, he has put himself in the class of attorneys practicing regularly in another state. He is not forbidden to appear in Kansas courts, but when so appearing, like all other attorneys regularly practicing in other states, he must associate local counsel with himself. And if local counsel's fee under the minimum fee schedules for the particular jurisdiction are unfair or unduly burdensome, neither the legislature nor the Supreme Court of Kansas is responsible therefor. The possible application of a regulation to extreme cases is not the test of constitutionality to be applied to such regulation.[28]

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26. *Rast* v. *Van Deman and Lewis Co.*, 240 U.S. 341, 60 L. Ed. 679.

27. *Puget Sound P & L Co.* v. *Seattle*, 291 U.S. 619, 78 L. Ed. 1025.

28. *Lemieux* v. *Young*, 211 U.S. 489, 53 L. Ed. 295.

Appellant argues that the words "regularly practicing outside of this state" appearing in Rule 54 provide no standard by which what constitutes "regularly practicing" may be determined, that the term is so vague and uncertain as to be invalid. Appellant is in no position to so contend for by his own statements he comes within the class of attorneys regularly practicing in other states. His jurisdictional statement recites that since 1947 he has "engaged in the general practice in Missouri" (p. 9), where he maintains an office, and is a member of the local bar association and of the integrated bar of that state (p. 10). He consults with as many clients in his Kansas City, Missouri, office as he does at his home in Kansas, and that most of his office work is done at his Missouri office, where he earns approximately one-half of his annual earnings in the practice of his profession (p. 11). From his own statements it cannot be said that there is any question but what he is "regularly practicing" law in the State of Missouri. He is therefore within that class which the statute and the rules require the association with him of local counsel when he appears in Kansas courts.

## CONCLUSION.

This, then, is the appellee's case:

1. Charged with promoting the general welfare of its citizens, the Kansas legislature determined that the work of its courts was hindered by lawyers from other states attempting to try cases in Kansas because of difficulties in service of notices, inability of the courts to exercise close supervision over them, and from lack of familiarity with Kansas law.

2. To prevent such hindrances, the legislature of Kansas enacted Sec. 7-104 requiring that local counsel be

associated with such lawyers regularly practicing in other states.

5. In obedience to the legislative mandate and to implement said statute, the Kansas Supreme Court adopted its present Rules 41 and 54.

4. The statute and said rules are not arbitrary but are reasonable, the restriction imposed thereby being based on substantial differences and having reasonable relation to the attorneys thereby affected and the public purpose sought to be accomplished.

5. The appellant Martin comes within the restricted class in that he practices law regularly in the State of Missouri and he is not excepted merely because he resides in Kansas and maintains an office in his home.

6. Said statute and rules do not violate the due process and equal protection clauses of the fourteenth amendment and said statute and rules constitute a valid exercise of the state's police power.

7. The decision of the Supreme Court of Kansas in this case should be affirmed.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

## No. 30.

KEITH MARTIN,
*Appellant,*

vs.

HEREERT WALTON AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS,
*Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

## BRIEF OF APPELLEE.

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IN THE

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OCTOBER TERM, 1961.

## No. 30.

KEITH MARTIN,
*Appellant,*

vs.

HERBERT WALTON AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS,
*Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

## BRIEF OF APPELLEE.

### JURISDICTION.

The judgment of the court below was entered on December 10, 1960 (R. 19). Appeal was timely perfected therefrom and probable jurisdiction was noted by the Court on March 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(2). It is respectfully

suggested that the judgment rests on an adequate non-federal basis since the relief sought by appellant, a writ of mandamus to appellee's predecessor in office, was not to compel the performance of any act which the law required appellee's predecessor to perform as a duty resulting from his office, but the purpose of the writ sought was to establish a legal right in appellant not authorized, and in fact prohibited, by statute and the Rules of the Supreme Court of the State of Kansas which were binding upon appellee's predecessor in office.

## STATUTES INVOLVED.

In addition to the statutes set out in appellant's brief, appellee deems the following provisions of the 1949 Kansas General Statutes to be pertinent.

Kan. G.S. 1949, 60-1701:

> "Jurisdiction; purposes generally. The writ of mandamus may be issued by the supreme court or the district court, or any justice or judge thereof, during term or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust, or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion. (L. 1909, ch. 182, Sec. 714; May 29; R.S. 1923, Sec. 60-1701.)"

Kan. G.S. 1949, 59-2501 (referring to probate courts of the state):

> "Rules may be promulgated. Appropriate rules of court not inconsistent with the provisions of this act may be promulgated by the supreme court to regulate the practice in matters covered by this act. (L. 1939, ch. 180, Sec. 278; July 1.)"

Kan. G.S. 1949, 60-3825:

> "Supreme court rules of procedure authorized. The judges of the supreme court may make and amend, from time to time, such further rules for the regulation of procedure in the supreme court and inferior courts consistent with this code, as they may deem proper. (L. 1909, ch. 182, Sec. 753; May 29; R.S. 1923, Sec. 60-3825.)"

## QUESTIONS PRESENTED.

1. Whether the judgment sought to be reviewed rests on an adequate non-federal basis?

2. May the Supreme Court of Kansas in the exercise of its powers concerning the practice of law within its jurisdiction, promulgate rules to regulate the practice of law within the state by attorneys who are regularly engaged in the practice of law in other jurisdictions although such attorneys are licensed to practice in Kansas?

## STATEMENT.

The statement of facts set forth in appellant's brief is accurate insofar as it relates to the allegations of his petition for mandamus. A motion to quash the alternative writ of mandamus was sustained (R. 13) and, therefore, no issue of fact has been adjudicated and the truth of the facts pleaded is admitted for the purpose of determining their legal effect. It should be noted that in its ruling, the trial court stated that there was no clear-cut duty on the part of the defendant (appellee's predecessor) to permit the plaintiff (appellant) to practice before his court without compliance with amended Rules 41 and 54 of the Supreme Court of Kansas (R. 12).

Appellant also in his statement extensively reviews the facts of *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190 (1959), appeal dismissed 361 U.S. 374 (1960), which involved the same contentions of appellant that he advances herein. While appellant makes the assertion here that he has been deprived of substantial property rights, he made the following statement under oath in the proceedings in the Taylor case:

> "Mr. Scott: May I ask you one question, Mr. Martin? Has any lawyer or any member of the Bar of the State, of Johnson County or Wyandotte County, ever refused to act as local counsel with you and for you in any case?
>
> "Mr. Martin: No. In fact, practically all of them have volunteered to do it without pay; however, I believe through the years that although it is an act of friendship and courtesy, now, it would out of plain decency, require compensation. . . ."

Appellee discloses the above fact which may raise a question as to whether the instant case presents a justiciable issue or merely an abstract question which should be dismissed for want of jurisdiction. *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923).

## SUMMARY OF ARGUMENT.

The relief sought by appellant herein was a writ of mandamus from a Kansas trial court directing the judge of a probate court to permit appellant to practice before the probate court in violation of rules of the Supreme Court of Kansas which were binding upon the probate judge. The probate judge had no clear, legal duty to disregard such rules, but was legally obligated to follow and enforce such rules. Mandamus clearly will not issue for such purpose and

the trial court quashed the alternative writ issued. On appeal, the Supreme Court of Kansas did not dismiss on this ground, but proceeded to adjudicate the constitutional issues raised by appellant, probably because the attack was leveled against rules promulgated by that court. Since appellant chose to seek a remedy to which he was not entitled under any construction of the facts and law, this appeal should be dismissed.

The rules promulgated by the Supreme Court of Kansas, the constitutionality of which are drawn in question by appellant, provide in substance that an attorney who is regularly engaged in the practice of law in another state, even though licensed to practice in Kansas, may be recognized as an attorney by the courts, commissions and agencies of Kansas only if he has associated and personally appearing with him an attorney who resides and maintains his law office within the judicial district in which the action is filed or pending, upon whom service may be had in all matters connected with such action or proceeding. For some time prior to the promulgation of these amended rules, the Supreme Court of Kansas had been confronted with situations wherein counsel, who were licensed to practice in Kansas, but who regularly engaged in practice in other jurisdictions, would appear in the Kansas courts, relying on their knowledge of the law of the state of their regular practice. When that law did not coincide with the applicable law of Kansas, the interests of the clients suffered. The fact that this group of lawyers regularly engaged in practice elsewhere led to difficulties in securing their attendance before Kansas courts and commissions and presented problems in securing service of notices and pleadings. Other adverse results stemmed therefrom and the Supreme Court of Kansas, determining that the state's legal system was detrimentally affected

thereby, promulgated the amended rules with the noted effect. The amended rules are a proper exercise of the police power of the state to promote the general welfare of its citizens and tend to benefit the administration of justice within the state.

The amended rules are fair and reasonable and were clearly designed to remedy an existing evil detrimental to the state's legal system. Their effect is to tend to secure the interest of its citizens in able representation before the courts and commissions of the state and the interest of the public in the best possible administration of justice by the state's legal system. The standard established by the amended rules is clear and certain and needs no judicial interpretation. The amended rules fully meet the test of the Due Process Clause of the Fourteenth Amendment.

The classification established by the Supreme Court of Kansas to achieve the intended beneficial purpose was neither capricious nor arbitrary, but based upon a reasonable consideration of difference or policy resulting from the experience of the rule making body. The amended rules are designed to accomplish a legitimate purpose of the exercise of the state's police power and do not violate the Equal Protection Clause of the Fourteenth Amendment.

## ARGUMENT.

### I. Appellant Was Not Entitled to the Relief Sought Since Appellee's Predecessor Did Not Refuse to Perform Any Duty Imposed on Him by Law.

Appellant instituted this proceeding in mandamus to secure a writ from the District Court of Johnson County, Kansas, directing the Probate Judge of said County to permit appellant to violate amended Rules 41 and 54 of the Supreme Court of Kansas and Kan. G.S. 1949, 7-104 (R. 6). The appropriate statute, Kan. G.S. 1949, 60-1701, set out at length above, permits the writ only to compel the performance of any act which the law specially enjoins as a duty resulting from an office. Appellant did not allege any law which compelled the performance of the act sought, but on the contrary alleged that the Probate Judge was complying with the rules of the Supreme Court of Kansas which were binding upon him.[1] Mandamus is a discretionary writ and will be allowed only to require a plain and indisputable duty imposed by law and will not be allowed to avoid the effects of law.[2] Nor will manda-

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1. Kan. G.S. 1949, 59-2501 and 60-3825, set out at length above. In his motion filed in this Court to substitute Herbert Walton in the place of Joseph S. Davis as the party appellee, appellant frankly states:

> "It is mandatory that the said Herbert Walton, as Probate Judge of Johnson County, Kansas, follow said rules as construed and applied by the Kansas Supreme Court."

The same contentions advanced by appellant herein had previously been decided adversely to him in *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190 (1959), appeal dismissed 361 U.S. 374 (1960).

2. *United States* v. *Ickes*, 98 F.2d 271 (D.C. Cir. 1938), certiorari denied 305 U.S. 619 (1938); *Miller* v. *Jackson*, 166 Kan. 141, 199 P.2d 513 (1948); *In re Insurance Tax Cases*, 160 Kan. 300, 161 P.2d 726 (1945), affirmed 328 U.S. 822 (1946), rehearing denied two cases 329 U.S. 819 (1946).

mus lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do. *Butterworth* v. *United States*, 112 U.S. 50 (1884).

Appellant did not seek to enforce a legal right which had been established, but sought to establish the right in this action. It is well settled that mandamus will not issue for such purpose.[3] If mandamus should be resorted to only in the most extreme cases to require a lower court to follow the rules promulgated by a higher court,[4] what right does a party have to a writ from an intermediate court directing a lower court to disregard the rules of a higher court with the power of making rules for the lower court? If it can be said that a court abuses its discretion in following the rules promulgated by a superior court with inherent and statutory authority so to do, then our system of justice becomes merely a collection of separate entities, each free to disregard the existence, rules and opinions of the others.

The trial court recognized the controlling rule of law and stated that under the facts alleged in this petition, there was no clear-cut duty on the part of appellee's predecessor to permit appellant to practice before his court

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3. *Supervisors of Carroll Co.* v. *United States*, 85 U.S. 71 (1873); *United States* v. *Nordbye*, 75 F.2d 744 (8th Cir. 1935), certiorari denied *Love* v. *Nordbye*, 296 U.S. 572 (1935). It has also been held that mandamus will not lie to compel a federal District Court to admit a petitioner to its bar, notwithstanding petitioner's contention that it was the clear duty of the District Court so to do. *In re Flasphaler*, 228 F.2d 53 (D.C. Cir. 1955), certiorari denied 351 U.S. 973 (1956), rehearing denied 352 U.S. 861 (1956).

4. *Howes Leather Co.* v. *LaBuy*, 226 F.2d 703 (7th Cir. 1955), affirmed 352 U.S. 249 (1957), rehearing denied 352 U.S. 1019 (1957).

without compliance with amended Rules 41 and 54 of the Supreme Court of Kansas (R. 12). This point was urged by appellee's predecessor in the proceedings in the Supreme Court of Kansas, but that court chose to adjudicate the broad issue presented by the pleading. Its reason for so doing may be assumed from the fact that it had promulgated the rules attacked and a reading of appellant's brief will disclose that, in substance, he charges the members of the Supreme Court of the State of Kansas with bad faith, lack of knowledge, or a combination thereof, in the promulgation of the subject rules. A court thus attacked may choose to overlook strict legal grounds for dismissal of the action in order that the litigant may have his full say and his arguments be answered even though clearly not entitled to the relief prayed. This Court need have no such reluctance and it is respectfully submitted that this appeal should be dismissed for the reason that appellant was not entitled to a writ of mandamus herein since appellee's predecessor did not refuse to perform any act which the law required of him as a duty resulting from his office.

## II. Due Process.

### A. The Rules Promulgated by the Supreme Court of Kansas Do Not Deprive Any Person of Property Without Due Process of Law, but Are a Proper Exercise of the Police Power of the State.

The broad question before the Court for decision is one dealing with the police power of the state. Specifically, it is a question of the regulation of the legal profession. At issue is whether the State of Kansas, by its Supreme Court, may regulate the members of its bar. Included is the *ad hoc* proposition of whether the subject rules of the Supreme Court of Kansas (R. 6-7) are a valid exercise of the state's regulatory powers.

Appellant grudgingly admits that courts, including this Court, have repeatedly affirmed the basic rule that the practice of law is a privilege and not a right. Appellant also concedes that lawyers occupy a unique position in our judicial system as officers of the court. However, appellant baldly states that the repeated enunciations of such principles are dicta and may be disregarded (Br. 15). Appellant asks this Court to forget what was only recently said in *Lathrop* v. *Donohue*, U.S. , 6 L Ed. 2d 1191 (1961) and *Cohen* v. *Hurley*, 366 U.S. 117 (1961). Admittedly a lawyer's status and rights are not by the grace or whim of the court, but the lawyer having been granted the privilege of practicing law must adhere to high standards and is subject to the continuing regulation of the court.

Appellant does not argue the Kansas court has no power to regulate its bar, but that the rules in question were designed by the Supreme Court of Kansas to prevent appellant from practicing law in Kansas. Of course, while appellant has not cited one instance where his privilege of practicing in Kansas has been denied, he contends that appellee's predecessor informed him that he could not practice in his court without following the rules of the Supreme Court of Kansas regulating practice by lawyers who regularly practice in states other than Kansas. Appellant admittedly practices regularly in Missouri (R. 2-3), but contends from the fact that he shares an office in Kansas and has some Kansas law books at his home (R. 32), that he actually practices regularly in Kansas also. The facts in appellant's petition before the trial court were taken to be true for the purposes of the motion to quash the writ; also, the facts stated in the opinion of the Supreme Court of Kansas in *Martin* v. *Davis*, 187 Kan. 473, 357 P.2d 782 (1960) (R. 17-32), are properly before this Court.

The appellant, in arguing that amended Rules 41 and 54 as promulgated by the Supreme Court of Kansas are a denial of due process of law, relies to a great extent on the case of *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957). Appellee has no quarrel with either the result of the *Schware* case or the general principles therein stated as they relate themselves to the question of due process of law. Appellee does contend, as the Supreme Court of Kansas found (R. 26), that what was said and held in the *Schware* case is not controlling in the instant case.

The Court will recall that Schware claimed to be denied due process of law by reason of the New Mexico Board of Bar Examiners arbitrarily and capriciously finding his moral character to be such that he was not qualified for admission. The regulation or rule as such and its constitutionality were not in question, so that the sole issue was personalized to Schware. Did he have or did he lack the required moral character? Contrast that issue to the instant case wherein appellant freely admits he is regularly engaged in the practice of law in another state (R. 2-3), thereby placing himself clearly within the purview of amended Rules 41 and 54, but claims that said rules in and of themselves are a denial of due process of law and are thereby unconstitutional. This distinction is real and of utmost importance because this Court, in determining the constitutionality of the Rules of the Supreme Court of Kansas, must view them in light of their relationship to, and effect on, the public welfare, while keeping in mind the acts and failures of the entire group of lawyers classified under said rules. The individual acts, failures or legal ability of appellant cannot be decisive. Even if this Court should find that appellant personally is not and has never been guilty of any of the shortcomings amended Rules 41 and 54 were designed to remedy, such a finding could

not be the basis for adjudicating the rules to be unconstitutional. This Court has often stated that a legislative act is not to be refused application by the courts as arbitrary and capricious and forbidden by the due process clause merely because it is deemed in a particular case to work an inequitable result. *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Admittedly, the rules of the Supreme Court of Kansas are of a legislative nature for the purposes of this case. *Lathrop* v. *Donohue, supra.*

*Dent* v. *State of West Virginia*, 129 U.S. 114 (1889), laid down basic principles repeatedly followed and cited over the years in the area of state regulation of professional persons. Dent had been engaged in the practice of medicine in West Virginia for approximately 6 years when a law was enacted requiring physicians to have been engaged in practice 10 years or present an acceptable diploma or pass an examination in order to continue in practice. Dent's diploma was not acceptable and he refused to take the examination. He claimed, among other things, that the statute destroyed his vested rights and deprived him of the estate he had acquired in his profession by years of study, practice, diligence and attention and deprived him of an established reputation as a practitioner. In upholding the validity of the statute in question as constitutional, this Court stated:

> "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or *tend to secure* them against the consequences of ignorance and incapacity. . . .
>
> "The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity.

> "It is only when they have *no* relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation." 129 U.S. at 122. (Emphasis supplied)

It is well settled that this Court has nothing to do with the wisdom, workability or fairness of a statutory plan of regulation. *Wickard* v. *Filburn, supra*, at 129.

The Supreme Court of Kansas, acting in a quasi-legislative capacity, prior to promulgating amended Rules 41 and 54, had actual knowledge and took judicial notice of several factors which in its judgment made the enactment of the amended rules advisable for the improvement of the existing legal system and the protection of litigants and the general public (R. 26-29). Of course, the accumulative judicial wisdom and knowledge gained by the Supreme Court of Kansas from the cases presented to it for decision were also brought into account in the formulation of the rules here under attack.

Such questions as docket congestion, the interest of the parties, the public interest in the speedy and efficient administration of justice, the raising of standards of professional knowledge of the Kansas Bar were certainly considered in the promulgation of amended Rules 41 and 54 of the Supreme Court of Kansas and the effect of those rules in practice is to secure, or tend to secure, the lawful and commendable purpose for which the court strove.

Faced with a serious threat to the best possible administration of justice in Kansas, a more detailed discussion of which will be set out in the next section of this brief, the supreme court amended its rules to include those in question. Disregarding the wisdom or workability of such regulations, do they meet the basic tests laid down in *Dent* v. *West Virginia, supra*?

**(1) Do they secure or tend to secure the public against the consequences of ignorance and incapacity?**

The Supreme Court of Kansas has every reason to believe that litigants before the courts and administrative bodies of Kansas probably will be, and certainly must tend to be, better represented when at least one attorney appearing on their behalf dedicates his full professional effort and day to day experience in striving for mastery of the varied ramifications of Kansas law.

**(2) Are the regulations necessary?**

The Supreme Court of Kansas, responsible for the level of the administration of justice in that state, certainly could find the regulations were necessary and this Court is charged with a primary dependence on the judgment of that body in this area. Examples of the factors which, in the opinion of the Supreme Court of Kansas, rendered the regulations necessary are set out in its opinion and in this brief.

**(3) Do the regulations have any relation to the profession in question?**

The expressed and obvious reason for the regulations is to require of lawyers, practicing before the courts and administrative bodies of Kansas, the highest possible degree of knowledge and skill in that state's law. Surely such knowledge and skill is basic to, and bears every relation to, the practice of law. In commenting on Kan. G.S. 1949, 7-104, enacted for the same purpose and also attacked by appellant, the Kansas court stated:

> ". . . It has been believed that lawyers not regularly practicing in the state are not usually entirely familiar with the law and procedure thereof and that the public is entitled to have adequate counsel; and

second, that the trial court should have complete and immediate jurisdiction over counsel appearing before it."[5]

The principles enunciated in the recent case of *Lathrop* v. *Donohue*, *supra*, lend support to the validity of amended Rules 41 and 54 of the Supreme Court of Kansas. If a lawyer admitted prior to the establishment of an integrated bar may be required to pay dues to such an organization for his continued privilege to practice law, may not the Supreme Court of Kansas also require a certain class of practitioners who regularly practice elsewhere to associate a full time Kansas practitioner as local counsel when appearing in Kansas courts. Appellant complains that the recommended fee schedules for the areas involved would deprive appellant of some of his income (Br. 10). Such complaint does not appear to be valid if his testimony is correct (P. 4, *supra*). Appellant, of course,

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5. *Thornburg* v. *McClelland*, 186 Kan. 20, 348 P.2d 617 (1960). It is also worthy of note that since the adoption of amended Rules 41 and 54, the Legislature of Kansas has met twice and has not seen fit to amend Kan. G.S. 1949, 7-104. In the 1959 Session, attorneys in the same category as appellant caused House Bill No. 377 by the Committee on Judiciary to be introduced. The bill proposed to amend Kan. G.S. 1949, 7-104, by adding the following italicized matter:

> "*Provided*, Nothing in this section shall be construed: (*a*) To prohibit any party from appearing before any of said courts, tribunals or agencies, in his own proper person and on his own behalf; *or* (*b*) *any person who has been regularly admitted to practice law in the courts of this state and whose certificate of authority to so practice has not been revoked or suspended and who resides in this state from appearing before, or in, any of said courts, tribunals or agencies as an attorney even though he may be engaged in the practice of law in another state or may maintain a law office in another state.*"

After public hearings thereon, including the testimony of experienced trial court judges, the bill failed to pass the Legislature.

does not recognize that this requirement of local counsel may aid his client's cause and that justice may be better served. Appellant's only concern is that *his* income *might* be less. As the Supreme Court of Kansas noted in *Martin* v. *Davis, supra*, many lawyers in the Greater Kansas City area confine their practice exclusively to one state and when business takes them to another state they employ counsel regularly practicing in the other jurisdiction in order to serve their clients better. While these lawyers may not be as intelligent as appellant, they apparently manage to earn a living and serve their clients by giving them the advantage of the best available knowledge on the applicable law.

As to appellant's assertion that he has been "effectively disbarred from practice in Kansas" (Br. 13), the Court need only read the subject rules to see that such statement is not accurate. He may do all acts embraced within the practice of his profession. The only effect of amended Rules 41 and 54 is to require that when he practices before the courts, commissions and agencies of Kansas, he must have associated and personally appearing with him an attorney who resides and maintains his law office within the judicial district in which the action is filed or pending upon whom service may be had in all matters connected with such action or proceeding. The legislative and judicial goal of certain, prompt service upon readily available counsel of record is patent. The further goal of the presence of counsel fully familiar with the procedural and substantive law of Kansas and the rules of courts and commissions in proceedings where immediate decisions must be made and there is no opportunity for research by one unfamiliar with the applicable law becomes as obvious upon reflection. As the court stated in *Taylor* v. *Taylor, supra*, at 328:

> ". . . Martin's license to practice law before the courts of the state of Kansas has not been in dispute nor has he been disbarred. . . ."

Appellant suggests that the Supreme Court of Kansas in conference created the facts of which it took judicial notice in an *ex post facto* reasoning for support of its already established rules in order to limit appellant's Kansas practice (Br. 26). However, appellant does not claim the facts judicially noted are not true and, as hereinafter noted, at least some of them were matters of public knowledge, recorded in the opinions of the court long prior to the promulgation of the amended rules attacked.

Appellant states that he has not been guilty of the shortcomings of other lawyers regularly practicing in other states. The record does not bear out this assertion, but assuming *arguendo* that appellant is without fault, this is not the test. The problems that amended Rules 41 and 54 seek to curb deal with a *class* of lawyers, just as the problems and aims of the Wisconsin integrated bar were concerned with the raising of the bar's standard and not those of Trayton L. Lathrop. So here too the Kansas court was looking to the public interest and not at an individual.

**B. The Subject Rules of the Supreme Court of Kansas Are Fair and Reasonable.**

Appellant contends that the subject rules are arbitrary and unreasonable and that the Supreme Court of Kansas took "extravagant judicial notice of facts—facts pertaining to hypothetical evils wholly without reference to him". (Br. 26). Naturally, the Supreme Court of Kansas took no notice of appellant's acts in particular for it was the acts of a class of attorneys which time after time challenged the court's attention by reason of the effect on their clients' rights of the lawyers' lack of knowledge of

Kansas law and their reliance on their knowledge of the law of another state without ascertaining the law of the forum.

Appellee will not burden this Court with an extended delineation of the acts brought to the attention of the Supreme Court of Kansas which showed the necessity for the rules subsequently promulgated, but reference will be made to two examples as an indicia. In *Felton* v. *Rubow*, 163 Kan. 82, 179 P.2d 935 (1947), an attorney regularly engaged in practice in Oklahoma instituted a proceeding in the District Court of Osage County, Kansas, although clearly under the probate code (now Kan. G.S. 1949, ch. 59, as amended), the proper forum was the probate court of that county. The district court sustained a motion to dismiss for want of jurisdiction, but even at that stage the plaintiff's attorney did not see the necessity of acquainting himself with the statutory law of Kansas and an appeal was taken to the Supreme Court of Kansas where the judgment of dismissal was affirmed. In its opinion, at 84, the Court stated:

> "Counsel for appellant is a nonresident of this state. Obviously he is not familiar with our statutes pertaining to the estates of deceased persons nor with the jurisdiction of our courts pertaining to such estates. He ignored our statute (G.S., 1945 Supp., 7-104), which required him to have an attorney in this state associated with him. Our recent legislature has amended the statute last mentioned (Senate Bill No. 234) with the hope of avoiding such miscarriages of justice in the future."

Even as against appellant's assertion that the hypothetical evils were without relation to him, the record is to the contrary. Appellant notes in his brief (Br. 8) the five cases which he has argued in the Supreme Court of Kansas and

one of these was *State* v. *Fletcher*, 174 Kan. 530, 256 P.2d 847 (1953). Appellant was the sole counsel for the accused in the trial court and in the appellate court. As to two of the errors specified by him on appeal, the opinion, at 531, states:

> "Appellant complains also of a ruling of the trial court excluding certain evidence. The excluded evidence was not produced on the hearing of the motion for a new trial and we have nothing to review. See *State* v. *Zeilinger*, 147 Kan. 707, Syl., Par. 3, 78 P.2d 845.
>
> "Appellant complains that the trial court erred in not instructing on claimed lesser offenses. No request was made for such an instruction. . . ."

While it is not suggested that appellant's individual actions were such as to require the promulgation of the amended rules, the Court can readily recognize that if an attorney of appellant's ability, as evidenced by his membership in Phi Beta Kappa and Order of the Coif (R. 2), should fail to follow the procedural law of Kansas by reason of his reliance on his knowledge of the law of the jurisdiction where he regularly practices, how much greater were the problems presented to the Kansas courts by attorneys in the same classification but with more limited abilities.

The rules of the Supreme Court of Kansas seem much more fair and reasonable than the result reached in *Virgin Islands Bar Association* v. *Dench*, 124 F. Supp. 257, 258 (1953), appeal dismissed 215 F.2d 810 (3rd Cir. 1954), where it was stated:

> "It is generally accepted that an attorney is an officer of the Court and, as such, an officer and arm of the state. See 7 C.J.S., Attorney and Client, Sec. 4, p. 706 and 5 Am. Jur. 264. It follows that one cannot be an officer of two different states at the same time, and it has always been the understanding of

this Court that a lawyer cannot practice in two jurisdictions at the same time.

> ". . . It is common practice, however, for courts to permit members of the bar of other states to appear as counsel on the trial or argument of particular cases, but not to admit them to general practice while they are actively practicing in another state. . . ."

The Supreme Court of Kansas took judicial notice prior to promulgation of amended Rules 41 and 54, of the problems arising where a lawyer keeps regular office hours daily in one state, and pays a nominal sum to keep his name on a door, a phone listed in his name, and has someone take his calls and forward them, all in another state; such problems as that of service of notices; of the necessity for a lawyer to keep up with changes in law and procedure; and, as important, or more so from a practical standpoint, the necessity of becoming and staying familiar with local court rules and practices (R. 26-28).

Another potent reason for the rules would appear to be the increased measure of control of lawyers before the bench. A Missouri lawyer with a Kansas license, is less likely to be as amenable to court discipline when he has a relatively safe place to which to retire, even though ultimately forbidden to enter Kansas courts by reason of his contumacy.

The mere fact that the Wyandotte-Johnson-Jackson-Clay-Platte county areas form Greater Kansas City, an urban economic unit, across state lines, does not change the fact that substantive law and procedure are different, often strikingly so, as in the case of property, titles, descents and distribution of estates and trial practice.

Again, no contention is advanced by appellee that appellant necessarily falls within any of the criticisms

and objections leveled above, but the fact that he claims to be personally free from the faults the rules were intended to prevent does not lessen their necessity, nor make them unreasonable or arbitrary.

**C. The Standard Established in the Subject Rules Is Not Vague and Uncertain.**

Appellant complains that the words "regularly engaged in the practice of law" were not defined by the Supreme Court of Kansas and, therefore, the rule is so vague and uncertain as to fall within the bar of the Fourteenth Amendment. It would appear that the words are self-defining and sufficiently establish a standard. What definition could the court have given which in itself would not have been more complex and less clear than the quoted language? However, if appellant is really in doubt, he may consult the opinions of the court in *State ex rel.* v. *Schmitt*, 174 Kan. 581, 258 P.2d 228 (1953); *Bradley* v. *Sudler*, 172 Kan. 367, 239 P.2d 921 (1952); and *Depew* v. *Wichita Association of Credit Men*, 142 Kan. 403, 49 P.2d 1041 (1935), certiorari denied 297 U.S. 710 (1936). A perusal of appellant's petition (R. 2-6) shows that at the time it was drawn, appellant had no question about the standard and its relationship to his activities. Appellant affirmatively alleged that he has practiced law in Missouri since 1947, maintains his office in the Bryant Building in Kansas City, Missouri, and that his Kansas license is affected so long as he "regularly" practices in Missouri. If "good moral character" is a sufficient standard, *Schware* v. *Board of Bar Examiners*, *supra*, how much more definite and certain is "regularly engaged in the practice of law". Both cases cited by appellant to this point were appeals from convictions under state criminal statutes and no reference is made to any case involving a factual situation

similar to the instant case. It is respectfully submitted that the elements of due process enumerated in *Dent* v. *State of West Virginia, supra,* are applicable and are fully met by the subject rules. Further, the trial court found that the original petition herein disclosed on its face that appellant is a member of the Missouri bar and regularly practices in that state and thus is within the purview of amended Rules 41 and 54 (R. 12). Appellant assigned no error to such finding in the proceedings before the Supreme Court of the State of Kansas (R. 14) and it is therefore conclusive.

**III. Does the Equal Protection Clause Require That a State Be Denied the Right to Administer Its Courts and Attorneys Practicing Before Those Courts Based on a Classification of Those Regularly Engaged in the Practice of Law in Another State?**

Equal protection of the laws as required by the Fourteenth Amendment is not violated by the classification imposed by amended Rules 41 and 54. The classification of Kansas licensed lawyers into those practicing within the state and those regularly practicing outside the state is based upon a substantial difference which has a reasonable relation to the public purpose to be accomplished.

The Supreme Court of Kansas did not arbitrarily arrive at the classification here made. Judicial notice was taken of many things which provide a rational and substantial basis for the classification (R. 26-28). The field of law is broad and varied. With few or no exceptions can the lawyer today be proficient in every daily demand —local agencies, rules and procedures differ as often as one crosses state boundary lines. It is reasonable to expect that a Kansas lawyer, regularly practicing in Kansas and devoting his full abilities and energies thereto, should

be better able to represent a client than a lawyer licensed in Kansas but regularly practicing in another state.

In *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526 (1959), it was said of the Equal Protection Clause:

> ". . . But that clause imposes no iron rule of equality. . . . ."
>
> . . .
>
> " ' . . . If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' . . ."
>
> . . .
>
> ". . . Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. . . ."
>
> . . .
>
> ". . . We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. . . ."

Appellee has quoted above the tests required of a classification under the Equal Protection Clause of the Fourteenth Amendment. Appellee refers this Court to the reasons for the classification made by the Supreme Court of Kansas and submits that this "state of facts" sustains the classification established by the Supreme Court of Kansas.

Appellant would ask of the court that its rules should be subjectively classified; that the classification should be made vertically, based on individual personalities rather than horizontally as they now exist. Such vertical classi-

fication has odious overtones and on its face would appear to insure lack of equal protection of the law.

The Fourteenth Amendment and its guarantee to all citizens of equal protection of the law was not intended to stifle the state in the exercise of its police powers toward legitimate purposes."

A state can resort to any reasonable device to insure that those whom it is intended to regulate shall voluntarily submit thereto and this carries with it the right to influence their choice by attaching advantages to voluntary submission to the state's policy or disadvantages to a refusal to do so. Equal protection is not denied to those whose refusal to cooperate with the state involves a denial to them of advantages conferred on others who comply or the imposition of burdens from which the others are immune. See *Middleton* v. *Texas Power & L. Co.*, 249 U.S. 152 (1919); *Hawkins* v. *Bleakly*, 243 U.S. 210 (1917); and *Assaria State Bank* v. *Dolley*, 219 U.S. 121 (1911).

This Court should not assume, as appellant would have it do, that the rules promulgated by the Supreme Court of Kansas were arbitrarily adopted or made without good

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6. "1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

reason to further a legitimate policy of the state. Appellant's brief is replete with statements and innuendos that he is being singled out by the court for unfair treatment, although no facts are shown to support the insinuations and the record indicates at least some 299 other lawyers are similarly affected (R. 27). Appellant would ask this Court to believe that the Supreme Court of Kansas has formulated rules to capriciously deprive him of his constitutional prerogatives. That the appellant would ascribe such motives to the court is not only unfounded but is grossly unfair. This is not to say that states have not in the past, and will no doubt on occasion in the future, deprive their citizens of a part or a portion of their constitutional rights, but to ascribe such a base claim to the collective motives of the Supreme Court of Kansas is vain in its statement and does not befit a lawyer. The practice of law is an honored profession calling for the very best from its artisans at all times. What other profession can boast that its greatest asset is the opportunity to serve a purpose other than, and far greater than, the self interest of the practitioner. With this as the very basic tenet of our profession, can it be said the highest court of the State of Kansas properly entrusted with the responsibility of demanding the very best of its practicing lawyers, acted capriciously in postulating the rules in question. Or broader still, can this Court not conceive how a classification based on "regularly engaging in the practice of law in another state", serves a reasonable purpose in asking, yea literally demanding, that the rights of litigants be protected to the fullest extent possible and the interest of the general public served by the more exact rendition of true justice in its courts.

## CONCLUSION.

It is respectfully urged that since the appellant commenced and maintained this action, seeking a particular remedy to which he was not entitled under the law and the facts, that this appeal should be dismissed. In the alternative, appellee submits that the rules of the Supreme Court of Kansas attacked herein are reasonably designed to attain the public purpose sought and are not in violation of the Fourteenth Amendment and for that reason, the judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

## No. 30.

KEITH MARTIN,
*Appellant,*

vs.

HERBERT WALTON, As Probate Judge of
Johnson County, Kansas.

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

## APPELLANT'S PETITION FOR REHEARING OR MODIFICATION OF JUDGMENT.

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HERBERT WALTON, As Probate Judge of
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AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

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**APPELLANT'S PETITION FOR REHEARING OR MODIFICATION OF JUDGMENT.**

The appellant petitions the Court for a Rehearing or Modification of the Judgment for the following reasons:

## I.

### The Decisions Relied Upon by the Court Do Not Support the Dismissal of the Appeal.

The case of Keith Martin has not been considered. The appeal has been dismissed as if the Kansas Supreme Court had made a general rule to cover some evil reasonably appearing to exist and for the sake of expeditious enforcement of the rule had included persons of varying degree of complicity in the evil and none wholly removed from it. Such was the nature of the statutes approved in *Phelps* v. *Board of Education*, 300 U.S. 319, and in *Samuels* v. *McCurdy*, 267 U.S. 188; *Murphy* v. *California*, 225 U.S. 623; *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 60. "Incidental individual inequality" did not make those statutes offensive because some connection was shown between the measures taken by the state and an end which the state had a right to achieve. Furthermore, to have relieved the individual from the scheme would have jeopardized it. *This court has never, until Martin's case, sustained the application of a rule or statute to a person who has no connection with the evils which the rule or statute is designed to prevent or prohibit.*

The Kansas Supreme Court in its opinion, the Attorney General of Kansas in his brief, and the appellee in his, admit that Keith Martin has done none of the things which the Kansas court asserts induced it to amend Rules 41 and 54. The Attorney General in his brief said, "As to his professional qualifications and his personal character there is no question." p. 2. The Kansas court does not say it thinks Martin will ever do any of these things. Had any one of the other lawyers with substantial bi-state practice attacked the constitutionality of the amended rules in the same way that Martin has done, the Kansas court would have been obliged to admit a total

lack of relevant wrongdoing, just as it has done in Martin's case, because the *reasons given by the court to support the amendment have reference to non-resident, out-of-state officed lawyers who do not practice regularly in Kansas* and not to Martin or members of his class. It is unjust to Martin to treat him as if he were merely objecting to being treated as other members of his class. The real issue is whether Martin can be constitutionally penalized by a stigma put on the class to which he belongs where no member of the class has committed a censurable act. Can a class be bad when none of its members are shown to be? *Are not the alleged evils—failure to answer docket calls, inability to procure service, failure to answer calls to appear on matters of urgency, and failure to familiarize oneself with rules of local practice—attributed to the class actually the derelictions of an individual which must be treated as such?* Perhaps the Kansas court was analogizing to the common law on conspiracy. If Martin and others like him are to be punished because they are deemed to be inimicable as a group to the best interests of justice in Kansas, should not the Kansas court be required to establish beyond a reasonable doubt the existence of an intention to conspire to pervert the ends of justice?

*Dent* v. *West Virginia*, 129 U.S. 114, *Graves* v. *Minnesota*, 272 U.S. 425, and *Hitchcock* v. *Collenberg*, 353 U.S. 919, are not precedents for the Kansas action. In each of these cases the state had imposed general requirements upon *all* practitioners of the particular profession in the state. No assumption was made that one class of practitioners was competent and another incompetent. Every practitioner was made to demonstrate his educational qualifications, or in *Dent*, to show an equivalent in practical experience. No objection could be made to a requirement that all Kansas licensed attorneys demonstrate in some reasonable fashion their actual competency to represent clients before Kansas

courts and administrative agencies. Nor would the Fourteenth Amendment be offended if all Kansas lawyers were required to maintain an office in Kansas where notices and other papers could be sent or served. *But Kansas has not acted by way of general disposition for all. Instead one group of lawyers has been conclusively presumed to be competent without need to demonstrate qualification while another group has been declared incompetent without opportunity to demonstrate competency.*

The factor of incompetency, moreover, is viciously flexible. The group of legal incompetents is subject to augmentation or diminution at the whim of the Kansas court's interpretation of the phrase "regularly practicing." Adjustability *ad hoc* is compatible neither with due process of law nor equal protection of the law. In *Dent* it is declared:

> "It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters: that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." 129 U.S. at 124.

## II.

### The Kansas Court's Findings Cannot Be Given the Respect Accorded to Legislative Fact Findings.

Neither the Attorney General of Kansas, nor the Kansas bar associations, nor the appellee contends that Martin has *not* been deprived of substantial rights. The "local counsel" requirement is not a technical formality which

can be satisfied simply by having a local attorney sign the necessary papers for a negligible fee. *Kansas insists that "local counsel" be present during the entire hearing in court.* For the time which the "local counsel" spends in court he must be compensated. According to the fee schedules of the Johnson and Wyandotte County bar associations in Kansas, he is entitled to one-third to one-half of the fee. No lawyer can afford economically to engage in a practice when he has to share the major part of the emoluments with a "local attorney" for his sitting service. The compulsory presence of "local counsel" is an affront to the integrity and capacity of the Kansas lawyer who must have it and a sign of his unworthiness to his former, present and potential clients. Moreover, the splitting of fees, except for service or responsibility, is considered an unethical practice, Canon 34, but here a court rule forces one Kansas lawyer to share his fees for court appearances with another Kansas lawyer because the "service" is required.

Keith Martin was admitted to practice in Kansas in 1948 after having satisfied the Kansas Supreme Court of his aptitude through the successful writing of an examination which that court thought adequate to test his competency to practice in Kansas. This license was for life and can be taken from him only for just cause. If Martin had been guilty of any of the misconduct which it is now alleged occasioned the 1958 amendments and if statutory disciplinary proceedings had been commenced against him on this account, he would have been entitled to the elementary decencies of due process. He would have had an opportunity to present evidence to rebut the charges against him. He could have been deprived of his rights only for reasons having relevancy to his fitness to practice. *Ex Parte Garland*, 4 Wall. 333; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. It is patent that the state would have failed in an attempt to discipline Martin because he has committed no wrong. It is equally patent that unless

the judgment of the Kansas Supreme Court is reversed, Kansas will have accomplished by subterfuge what it could not do by direct action. Kansas cannot disbar or discipline Martin, and others like him, by individual proceedings against each of them, on the ground that they also practice in Missouri, but the Kansas Supreme Court effectively disbars them by declaring the group, as a group, to be guilty of an offense. The Kansas court does not say they are guilty of the crime of practicing in Missouri, yet this is the crux of the matter. The penalty stricken in *Ex Parte Garland*, 4 Wall. 333, was hardly more arbitrary or less connected with actual competency to practice.

Reasons are assigned for the application of amended Rules 41 and 54 to Martin, which are without logical reference to him or his class. An *ex post facto* finding of fact is indulged in to give color of rationality to the Kansas court's action. *Martin is not permitted to rebut the charges which are indirectly made against him and his class* because the Kansas court purports not to be acting as a court trying him but as a legislative body explaining why it legislated as it did. In form the extravagant and unprecedented judicial notice the Kansas court took may be likened to the legislative finding in the preamble of a statute, to which this Court would be bound by comity to give the highest degree of respect even while entertaining serious doubts as to its well-foundedness, but in substance the court's findings are the rendering of a favorable judgment on itself in a case in which it is unavoidably a party though not named.

*Findings of fact under the color of unprecedented judicial notice by the supreme judicial authority of a state, unsupported by evidence in any sense of the concept of evidence in the law, and marshalled by the court alone in support of the court's own arbitrary and capricious rule, leave the citizen, whose rights under the Constitution are in-*

*fringed, without remedy, if judicial sanction by deference is given by the United States Supreme Court.*

The Kansas court is jury, judge, and it would appear executioner, too. The findings of the Kansas court pertain to Martin's constitutional rights in the same degree and in the same manner as if there had been a civil or criminal proceeding against him for misconduct. *Constitutional facts have not been left by the Constitution to the final determination of state tribunals. E. g. Payne* v. *Arkansas*, 356 U.S. 560. *It is the province and duty of the United States Supreme Court to re-examine the state tribunal's findings and to pronounce the violation of the Fourteenth Amendment which those findings were calculated to obscure.*

III.

**The Kansas Action, If Sustained, Is Pregnant with Danger to the American System.**

Kansas has created a new form of discrimination—discrimination against those who have chosen not to confine their activities to their home state. The Kansas objective is manifestly one of reprisal against lawyers with both in and out-of-state practice in favor of lawyers with only in-state practice and not one of improving the administration of justice in Kansas or of safeguarding the interests of litigants. The appellant would be automatically re-established in good standing and deemed fully competent to practice in Kansas courts were he to surrender the key to his Missouri office and cease to represent clients in Missouri. He would be no more knowledgeable, reliable or meritorious in fact, but abdication of his Missouri practice would be proof satisfactory to Kansas of his fitness.

After thirteen years of continuous practice in Kansas —including representing the State of Kansas (R. 3, *State*

*Highway Commissioner* v. *Abercrombie*, 185 Kan. 47, 340 P.2d 377), he is now deemed less competent, *by court rule*, than a recent licensee.

Even though Martin has practiced thirteen years in Kansas and his competence is admitted, the Johnson County and Wyandotte County bar associations stand solidly behind denying to Martin his right to practice in Kansas, except on the same basis as a "foreign attorney" (R. 10, 12, 19, 22, 23). What other motivation can there be than the expectation that Martin's Kansas practice will pass to lawyers who practice only in Kansas, since it cannot be anticipated that he will give up his Missouri practice in order to placate Kansas.

If the evils described by the Kansas court as the basis for its amendment of Rules 41 and 54 really exist, why was the court not aware of them in *Dyche* v. *Crawford*, 183 Kan. 441, 327 P.2d 1047, decided *five months* before the amendment? The Kansas court there held that the local counsel requirement of Kansas G.S. 1949, Sec. 7-104, was not applicable to a resident lawyer who had been admitted to practice in Kansas, even though he did not regularly practice in Kansas. Does not the active interest of the various Kansas bar associations in this case make it clear that the real reason for the rule is only economic? If the reason were other than economic, it would seem they would be helping Martin—not fighting him. If the local Kansas bar associations can exclude approximately twenty-five lawyers like Martin, including his co-counsel, F. L. Hagaman, who has been governor of Kansas and who has practiced there over thirty years, they will of course achieve a substantial economic gain.

Discrimination against a lawyer because he practices also in another state is as irrational as racial or religious discrimination and just as pernicious to American ideals.

The Constitution of the United States was proposed and adopted to secure, among other benefits, freedom from barriers to interstate enterprise. This Court has heretofore recognized the vitalness of the freedom to engage in activities outside one's own state, *Allgeyer* v. *Louisiana*, 165 U.S. 578; the necessity for freedom of movement of persons, *Edwards* v. *California*, 314 U.S. 160; and the incompatibility of protective walls to the well-being of the United States, *Baldwin* v. *Seeling*, 294 U.S. 511.

The ruling of Kansas is contrary to the policy of the American Bar Association which has approved of a lawyer practicing in New York and the Virgin Islands.[1] Many

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1. *Virgin Islands Bar Association* v. *Dench*, 215 F.2d 810, 813: "Following the admission of Mr. Dench when, apparently, it became known to the Virgin Islands Bar Association that he was continuing his practice in New York State, Mr. Corneiro, as a member of the Grievance Committee of the Virgin Islands Bar, wrote to Henry S. Drinker, Esquire, of Philadelphia, Chairman of the 'Standing Committee on Professional Ethics and Grievances' of the American Bar Association, and inquired of Mr. Drinker, *inter alia*: 'Would it be unethical, illegal or improper for an attorney admitted to practice in the Virgin Islands but also admitted to practice in New York, to maintain a partnership in New York, while practicing individually in the Virgin Islands(?)'. Mr. Drinker, as Chairman of the Committee, replied: '* * * I see no reason why a lawyer admitted both in the Virgin Islands and in New York, may not maintain an office in each place and have his letters show both offices, provided that his New York office is a *bona fide* office and that he is there from time to time, and available there for consultations.' Mr. Drinker also referred to and quoted Canon 33 of the 'Canons of Practice' of the ABA, which provides that lawyers admitted in different States may be in partnership together, and referred to Opinion 256 of the Committee relating in substance to listing in law directories of members of partnerships not all admitted to practice in the State where the listing is published. The Opinion states that such listings are ethically unobjectionable. The communications to and from Mr. Drinker are part of the record before us."

lawyers and law firms maintain offices in two of our major cities.

If a lawyer may be discriminated against because he engages also in out-of-state practice, there is good reason to suppose that he may be discriminated against for other activities which bear no relation to his competency to practice whenever a sufficiently powerful group finds that its interests lie in having that activity suppressed. Discrimination against a lawyer affects not merely his economic standing but his very ability to function as a lawyer and officer of the court. A lawyer cannot be a fearless, resolute defender of his clients if he is subject to the unbridled whims of a state court exercising its power of control over the Bar. To uphold the Kansas doctrine—the complete subjectability of the Bar to the Bench without even a hearing —violates the Bar's tradition of independence of many centuries.

The impact of sustaining the *Kansas rule of geographical discrimination* will be felt far beyond Keith Martin and the legal profession. If a lawyer may suffer discrimination because he will not consent to limit his practice to the state in which he resides and wherein he has an office, then every profession and calling which is subject to state or municipal licensing, and thus to state control, may be similarly afflicted. The rule, which declares that a lawyer is incompetent merely because he has regular practice outside the state, has its logical counterpart in a regulation which says that a plumber must be joined by a "local plumber" if he "regularly" plumbs in another state (on the ostensible grounds that plumbers are confused by exposure to different building codes and that specialization is needed) or a rule that accountants must not keep books for out-of-state clients where local and state tax laws may differ. Professional engineers, who frequently are

licensed in many states, will be excluded in favor of home-town talent, who know the "local" rules.

## CONCLUSION.

For the reasons given, it is submitted that the Court should

1. Sustain this petition for a rehearing to consider the issues raised herein. (Because the impact of this decision is of national importance to the legal profession, the various state and national bar associations, which have become aware of this case since November 6, should be given an opportunity to file briefs *amicus curiae*;) *or*

2. Modify the judgment *per curiam* and hold that Kansas cannot require a regularly practicing Kansas lawyer to be joined with "local counsel" in the Kansas courts (per Mr. Justice Douglas); *or*

3. Modify the judgment *per curiam* and hold that appellant's petition states a cause of action, whereupon appellant and appellee will have to make a record *based on evidence and not on unprecedented judicial notice.*

Respectfully submitted,

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## CERTIFICATE.

I hereby certify that the foregoing petition is not filed for delay, but in good faith and for the reasons stated herein.

.....,

F. L. HAGAMAN.